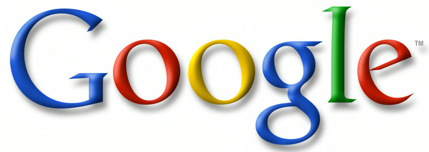

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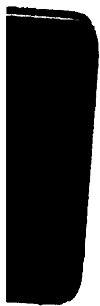

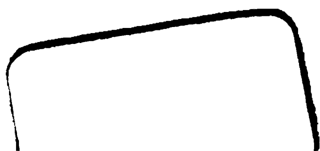

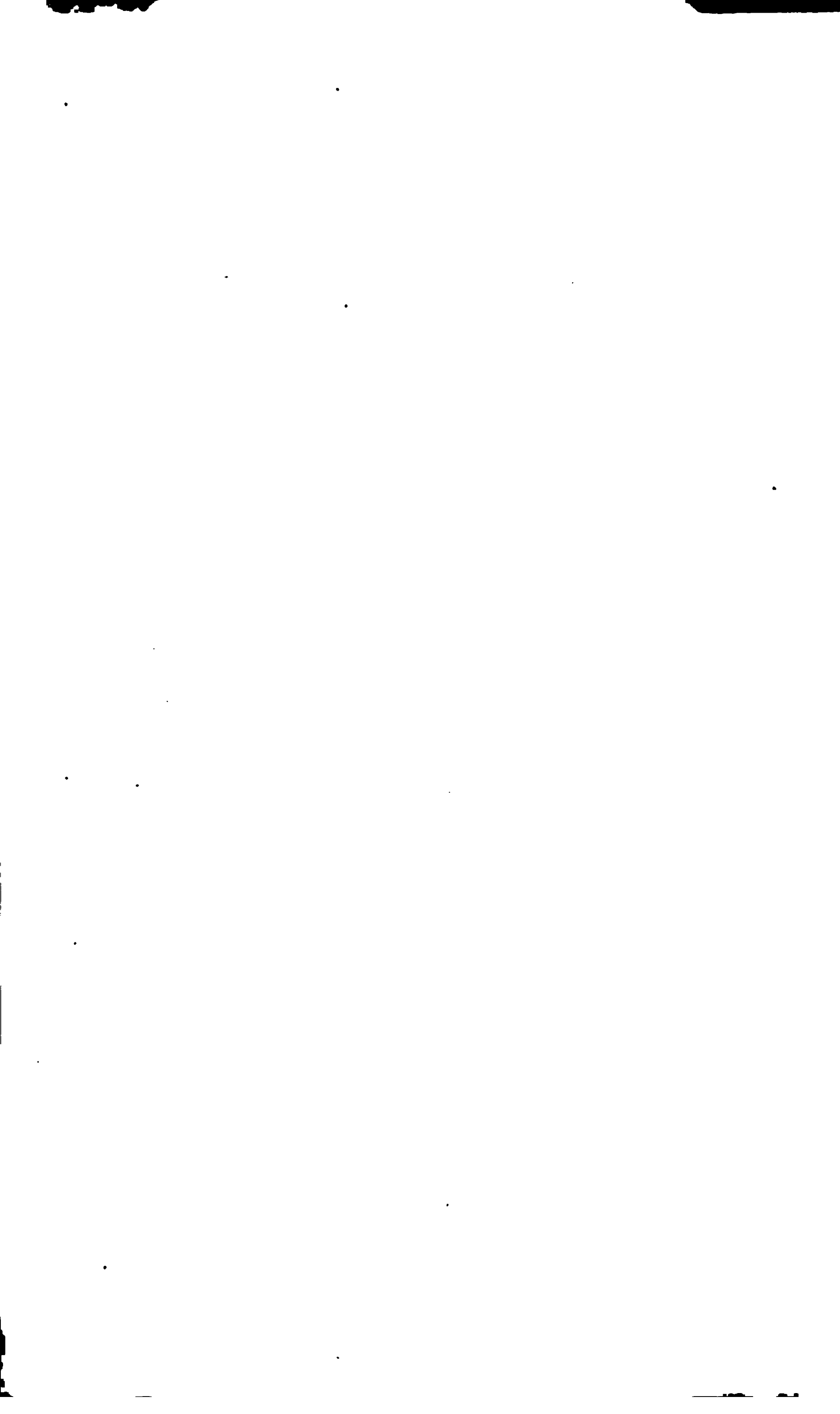

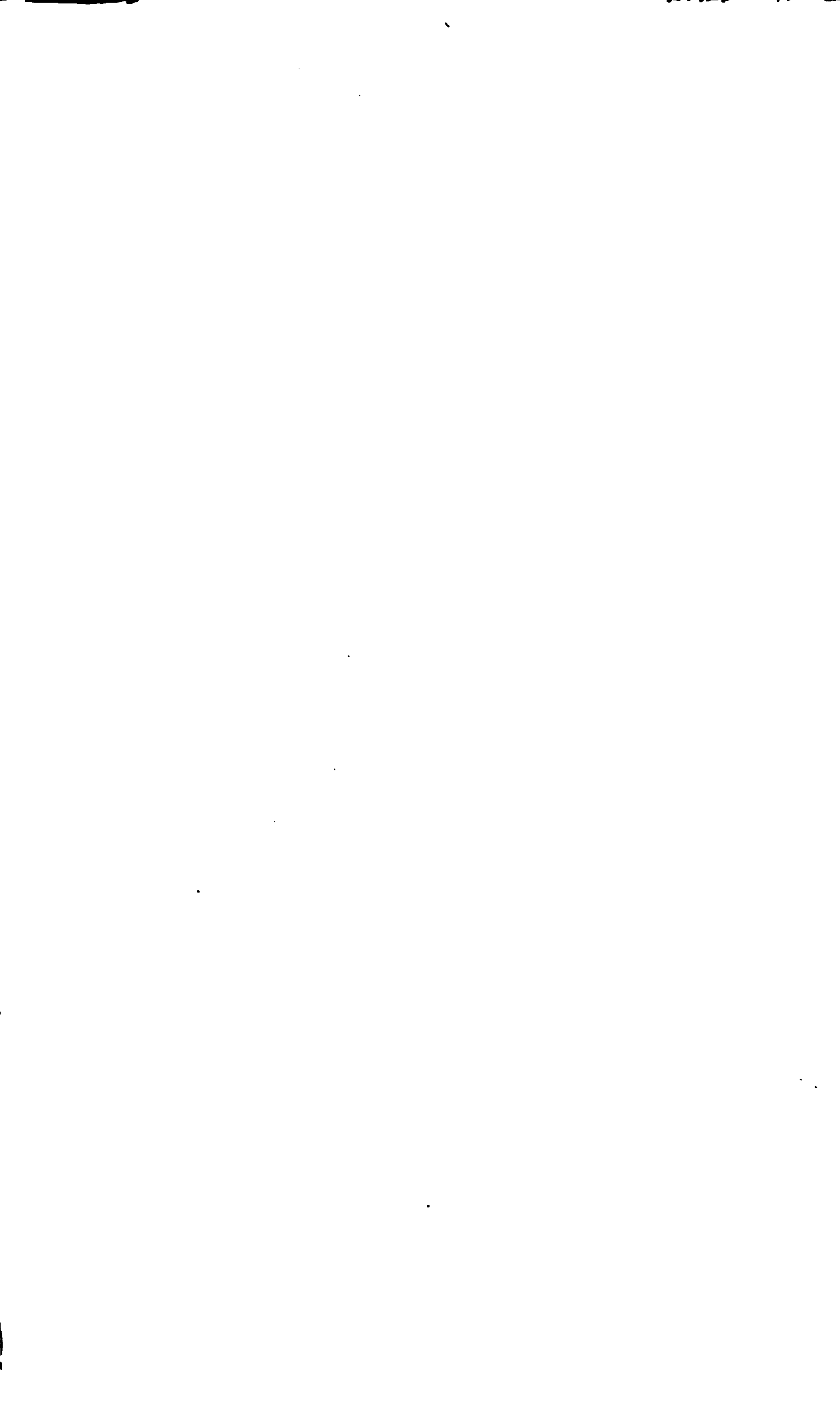

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THE

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FORENSIC MEDICINE FROM A SCOTTISH POINT OF VIEW.

By Douglas Maclagan, M.D., F.R.C.P.E.,
Professor of Forensic Medicine in the University of Edinburgh.

Being an Address in Forensic Medicine, delivered at the Meeting of the British Medical Association, Bath, August 9th, 1878.

My first duty is to thank you for having done me the honour of asking me to address you on the subject of Forensic Medicine. I should have been unwilling to accept this compliment if I had fancied that it was paid to me as an individual; but I recognise in it an expression of your goodwill to the University in which I have the honour to be a professor, and in the name of my Alma Mater I thank you cordially and sincerely. I only wish that she herself, and that department of our profession of which I have to speak to you, had not deprived me of a good deal of the time which I required for the due discharge of this duty; but an unusual number of candidates for degrees necessitated the bestowal of much of my time on examinations, and a succession of important medico-legal investigations occupying the hours I could spare from other work, concurred in engrossing my attention for some weeks. I am constrained to put in this special defence in extenuation of my poverty of performance—not for my own protection, but lest the University of Edinburgh should suffer in character from the shortcomings of him who is her representative on the present occasion.

I do not profess to have been troubled with much doubt as to the line which I should follow in addressing you. I have not thought of recounting to you the history of forensic medicine during the last year or two, because I am not aware of any startling discovery or revolution in opinion which marks an era in its progress. I never thought of occupying the time of busy practitioners of medicine with details as to processes of medico-legal investigation in which the great majority of you would never think of engaging. It never occurred to me to occupy your attention with a narrative of actual cases in which I have been engaged,

however curious may be the points which they present to us; for I feel that we are met here for better purposes than listening to histories, albeit I believe that, flavoured as they are with a slice of romance, they might at any rate be more captivating to your attention than anything I am about to say.

My idea is, that I can best fulfil the duty of addressing you on forensic medicine by ignoring individual instances and taking a look at the subject generally, especially in relation to the matter of preliminary inquiry into cases of a suspicious character which involve medical considerations. It is quite true that this means looking rather at the legal than the medical aspect of the subject; but the numerous letters which appeared last year in the Association's *Journal*, and the fact of a conference, mainly composed of medical men, having been held by the Parliamentary Bills Committee of the Association, under the presidency of Mr. Ernest Hart, on the subject of coroners' inquests in November last, justify me, I think, in following this line on the present occasion. It will, I suspect, prove that much of what I say will appear to you gentlemen of England to be heretical; but I believe you will not absolutely object to hear the views of one who has had some medico-legal experience in a country where there is no such person as a coroner, and no such body as a grand jury, but where there does exist in full activity a public prosecutor, who is almost an unknown functionary south of the Tweed.

Before saying anything further on the special subject of preliminary, or rather primary, investigations in a case of suspicion, let me shortly inquire in what estimation this department of State medicine is held by the public and by the professions of medicine and law. As regards the appreciation of forensic medicine by the general public (I mean the laity outside the professions of law and medicine), I think, on the whole, it tends to exaggeration. Ignorant of the modern progress of science, they, on the *omne ignotum pro magnifico* principle, are rather astounded by the evidence given in the courts by experts. They of course know nothing of the progress which chemistry, physiology, and pathology have made in recent times, and they regard as something marvellous, what we as well-educated medical men know to be only ordinary scientific knowledge, the delicate chemical results, the logically connected physiological phenomena, and the accurately noted pathological appearances which are brought forth, say in a trial for murder by poison, by well-qualified experts. Be it so. It is an error on the safe side, if it could only reach the minds of those who have criminal proclivities. Unhappily, most of them are of the rude, utterly ignorant class. But we have had our scientific murderers, our Palmers, Pritchards, Chantrelles, whose crimes have been satisfactorily brought home to them; and every conviction obtained under difficult circumstances is a fresh weapon in the hands of retributive justice, which she can wield as a terror to evil-doers. We must not in a

quackish spirit exaggerate, but we need not, in any spirit of mock humility, decry the power of good medical evidence for the detection of crime, and we may with honest pride point to what she can do, and in numerous instances has done, in the way of vindicating the offended majesty of the laws of God and man.

I am not quite sure what answer I should give to the question, How does the profession of the law regard forensic medicine? I think that on the whole your practising lawyer looks upon it as a rather sharp weapon, but he has some dread of it as a double-edged one; or rather he often regards it as a kind of boomerang, which may make a deadly hit if skilfully thrown, but which may occasionally turn back in an unexpected way and smite the arm which projected it. Do not accuse me of Scottish pride if I say that I believe forensic medicine is more properly appreciated among Scottish than among English lawyers. I think I have grounds for this; it is, at all events, more studied by them. No man is called to the Scottish Bar who has not attended a course of lectures on medical jurisprudence. I am not aware that any similar provision exists in your Inns of Court. This is not what should be. Forensic medicine is a weapon which every lawyer has occasion to employ, and, in order to his successfully scoring a hit, he ought to know its mechanism, the elevation he ought to give to it, and the allowance he ought to make for the wind of difficulty and uncertainty which more or less always blows across his range.

I have often seen in the records of both English and Scottish courts how the want of some knowledge of this nature has crippled the hands of a barrister. Nay, with all reverence be it said, how it has led to manifest nonsense being uttered from the Bench, by the mouths of those from whom better things might have been expected, and I would rather wish that English as well as Scottish lawyers (if there be no recent regulation to this effect, of which I am unaware) were obliged to make forensic medicine part of their professional study. I should be doing violence to my own sense of justice if I did not take this opportunity of saying that the law students who attend my lectures are, as a class, distinguished by their earnestness and zeal in acquiring knowledge, and if I did not record the satisfaction which I have often felt in our criminal courts in finding a young barrister employing in cross-examination of myself medico-legal knowledge which I had the privilege of imparting to him.

What shall I say as to the appreciation of forensic medicine by our own profession? I fear, if I am to be candid, I must say it sometimes has rather the cold shoulder turned to it. I fear that many of our students think it a matter of little or no importance, and many teachers do nothing to disabuse them on this point. You will, of course, absolve me, who am a teacher of forensic medicine, from the preposterous idea of holding that it need be placed upon the same platform, in regard to importance, as medicine, surgery, and obstetrics. I have seen and heard too

much of forensic work not to know how thoroughly an advocate may ruin his case by pleading it too high. I desire to avoid this. I do not ask that it should be a leading study; I only desire that it should not be neglected. I am, of course, aware of the argument that is often used, that forensic medicine is not a special science, but only that which is known to every man who is a well-informed and duly educated medical practitioner. I demur to this as a doctrine which ought to influence medical education; it is unsafe. Medical questions assume a very different aspect, and reflect very different hues, when viewed in the glare of a court of justice, from what they do in the mild light of the hospital or the sick-room. The function of the teacher of forensic medicine is to accustom the student's eye to adapt itself to this peculiar optical medium; it is to teach him to regard medical matters, with which as a practitioner he may be familiar, in the peculiar light under which they may be viewed in a court of justice. It is quite true, he cannot be a good witness unless he is a well-educated practitioner; but he may be a successful practitioner and yet find himself a very poor witness at a trial. I have no sympathy with, and still less would I have confidence in, a man who, not having given due attention to forensic medicine as a study, can glibly talk of his being able, on the score of his success in practice, to step jauntily into the box and show bench, bar, and jury that he knows all about it and can set them right. He is exactly the man who, riding on the bicycle of professional self-esteem, is apt to get an ugly fall—all the more disastrous that it occurs *coram publico*. Let me advise any young member of the profession who thinks he will make a good witness because he promises to be a good practitioner, to take warning from an old hand. I will cite no very recent, still less living, instances; but let such a one, if he have time and opportunity, look up the record (he will find it in Sir James Stephen's "General View of the Criminal Law of England") of the well-known trial of Donnellan for poisoning Sir Theodosius Boughton, and let him see how poor an appearance, to use no stronger phrase, was made in the witness-box by him who bore the *clarum et venerabile nomen* of John Hunter.

I make these remarks, not to magnify mine office as a teacher of forensic medicine, but to warn entrants to our profession of a possible danger lying ahead of them. I am afraid that I must say that the want of due appreciation of forensic medicine is not confined to students, but that there are loose ideas afloat on the subject among those who regulate their studies. I cite, as an example of this, the amended scheme for the Examining Board for England, as accepted by the conference of the representatives of all the authorities of England, which bears the date of May 18th, 1877, and the signature of so distinguished a man as Sir James Paget. I find there, under Regulation III., "That examiners be appointed to conduct examinations in the following subjects: 1. Anatomy; 2. Physi-

ology; 3. Chemistry; 4. Materia Medica; 5. Medical Botany; 6. Pharmacy; 7. Medicine; 8. Surgery; 9. Midwifery; 10. Forensic Medicine," but with this note in italics: "Questions in Forensic Medicine are to be included among those asked by the examiners on Chemistry, Medicine, Surgery, Midwifery." About the necessity of there being specific examiners on most of these subjects there can be no dispute,; but it strikes me as curious that, whilst it is proposed to have a specific examination on Medical Botany (whatever that may be, as distinct from the knowledge of the vegetable materia medica and scientific botany), Forensic Medicine is left to be distributed among the examiners in Chemistry, Medicine, Surgery, and Midwifery. I should have thought that two old proverbs, both of them musty but practical, might have suggested themselves to the framers of this clause. One is, that what is everybody's business is nobody's business; and that these various examiners, having their own subjects to attend to, are not likely to give much attention to forensic medicine. The other proverb relates to the danger of falling between two stools; but here we have no less than four of these articles of furniture on which forensic medicine is expected to poise itself, and I need hardly say that here there is a double chance of a tumble, with increased probabilities of permanent fundamental injury. Depend upon it, candidates for medical honours will not think much of a department of knowledge on which they are not to be asked questions, except in a vaguely incidental manner by those who are engaged examining them on others, and, as I proclaim them to be, more directly important subjects. Now, it is true that what I have quoted is not part of the regulations for candidates for a university degree, but is only part of the proposed scheme for examining those who are to obtain the minimum qualifications entitling them to enter the profession—in short, of those who may be expected to be the general practitioners of the land; and it may be said that it is sufficient for its purpose. I cannot assent to any such doctrine. It presents an educational phenomenon for which I have been somewhat puzzled to account; but I think I have found a solution thereof. It appears to me that the framers of this regulation, in considering the subject of forensic medicine, had suddenly found themselves in close proximity to the law; that, fired with a spirit of surgical enthusiasm, they had made an exploratory incision into the *corpus juris*, and from its "awful belly," to use an expression of Thomas Carlyle, had extracted that well-known nodule of the wisdom of the civil law, *De minimis non curat prætor*, and had translated this maxim thus: "The courts will not care much for the evidence of our minimists." And the courts would be right, if this be the way in which forensic medicine is to be set before the eyes of those who are working their way into the profession, provided the courts could dispense with the evidence of all but those holding the highest qualifications; but, unfortunately, in the majority of

instances, it is upon the evidence of the general practitioner, not on that of the special expert, that the tribunals must depend for the primary information which is essential for their guidance; and if the ordinary practitioner have not had due inducement to regard medical questions in a forensic light, he will be apt to miss important points of observation, or to make mistakes which may lead to an actual miscarriage of justice. Every one who has, as an expert, been consulted in important medical legal cases, must know how often he is in doubt what opinion to give, because the facts on which he has to found his conclusions have been stated in a loose and unintelligible style.

I know it is said that only a limited number of persons engage in medico-legal practice, and that it is unnecessary to demand, by the test of examination, a special knowledge of it from every one who enters the profession. I deny this altogether. What is forensic medicine? I take the definition from Mr. Chitty, who says it is "the evidence and opinions necessary to be delivered in courts of justice relative to criminal and other matters to be there determined." Is there any practising member of the profession who may not be any day called upon to narrate facts, and state opinions, in reference to a case with which he may one way or other have been connected? Is it not well for him to have had his attention directed to the aspect which any given case may present, when viewed in relation to the proceedings in a court? The fact is, that forensic medicine is the only branch of his profession which a man may be obliged to practise *nolens volens*. It is essential, if I am a candidate for a diploma, that I should be tested as to my knowledge of medicine, surgery, and midwifery, before I am let loose on a confiding public as a practitioner; but, once my diploma in my hand, I may now choose to abjure any one of these departments of medicine. You cannot compel me to amputate limbs if I choose to restrict myself to medicine. You cannot make me take charge of a case of pneumonia or typhoid fever if my tastes are in the way of surgery. You quite properly examine me in midwifery, but you cannot compel me to sit down at the bedside of a groaning woman and support her perinæum. But if I have, as a physician, a surgeon, or obstetrician, become connected with a case presenting some element of suspicion, a magistrate, or coroner, or procurator-fiscal may summon me, under penalties, to give evidence in a court, and in these circumstances I am practising forensic medicine. Is it not better, therefore, that I should be encouraged to study it in the knowledge that I shall be specially examined on it?—not induced to pay little attention to it by telling me I may be incidentally tested by those who are examining me on the more important subjects which are to be the constant objects of my professional attention. Will it not, in such circumstances, occur to me as a candidate, that the examiner in medicine is little likely to put aside scarlatina and smallpox, in order to

have time to ask me the diagnosis between idiopathic tetanus and strychnia poisoning; the surgical examiner, not likely to turn aside from inquiring as to my knowledge of fractures, in order to see whether I know how the directions of a wound may be indicative of suicide, homicide, or accident; or the obstetric examiner, to stop in his inquiry as to my acquaintance with placenta prævia and breech presentations, to see if I have any idea as to the medical evidence of rape, which in truth lies far away from the dark and mysterious regions which are his special province? I sincerely hope that the English authorities will so far re-amend this scheme for the examining board as to place forensic medicine in, at least, as good a position as medical botany; and, should a joint board be established in Scotland, I shall be somewhat astonished, if the department of knowledge on whose behalf I argue does not find itself in the position of an independent subject of examination, instead of being left to the attention, or it may be the neglect, of those examiners who have other and, as I acknowledge, more important matters in their hands.

It behoves me, however, to remember that my ostensible object in addressing you at this time is to look at the preliminary proceedings in the investigation of cases of suspicion, and to set before you briefly the impression made on my mind by the consideration of the methods followed in England and Scotland respectively. I need not say that the first and most characteristic difference between the practice of the two countries is the existence in Scotland of a public prosecutor, and the absence of this in England. This is not merely a difference in the method of setting the criminal law in motion, still less is it a mere distinction in name; it is a radical difference in following the great fundamental principle which, so far as I know (except in England), guides the criminal procedure of every European country, as it also does that of the United States of America, viz. that it is the duty of the State to undertake the prosecution of offences. The object of prosecuting crime is not to avenge or indemnify the party injured, but to maintain public order, or, as our indictments say, "to deter others from committing the like crimes in all time coming." And surely the maintenance of public order is emphatically the State's duty. The discussion of abstract principles, however, we may leave to philosophers, and look for a moment at the more practical question, Does the existence of a public prosecutor act beneficially or not as regards the investigation and the detection of crime? I daresay few of you have taken the trouble to wade through the evidence which was given by a Select Committee of the House of Commons on this subject in 1855, and reported to the House in the following year. It certainly presented some strong statements in condemnation of the then existing practice of the English criminal courts. A few examples may be cited. Lord Brougham stated to the Committee that "nothing could be more

ineffectual than the provision which the law and practice under it now made for the prosecution of offences;" and he concurs in the recorded opinion of Lord Denman, that "the procedure for the purpose of preliminary inquiry is open to great objection." Lord Campbell stated that "the criminal law is often most shamefully perverted to serve private purposes, and often perverted to very guilty purposes." The then Attorney-General, now Lord Chief-Justice Cockburn, stated that "cases are often brought to trial which, from being imperfectly got up, break down, and thus cause the acquittal of guilty parties. Many cases are likewise brought into Court where, on account of the trivial nature of the offences imputed, or the deficiency of the proof adduced, prosecutions are undesirable." I could cite many other pieces of evidence of like import, but the authority of those I have quoted makes them sufficient for the present purpose. I daresay, to the public generally, and perhaps to many of our legislators, this Blue-book is an unknown or forgotten document, and that it is chiefly inspected by curious spiders, which spin their webs about it in the dark corners of public libraries.

The Committee's labours did not, as you know, lead to the legislative recognition of the principle that prosecution of crimes should be undertaken by the State. They were unanimous in thinking that "the state of things referred to in the foregoing evidence is greatly defective, and urgently requires amendment;" and they propounded a scheme, into the details of which I need not go, by which they said they were of opinion that an efficient system of public prosecution may be established; and they added: "We recommend it to the consideration of the House as a means for placing the administration of criminal justice on a footing more consistent than the present with the necessities of the existing state of society and the requirements of an enlightened jurisprudence." It would be wrong in any one who is not a lawyer to say that the large labours of this Committee have produced no fruit directly or indirectly. In the Bill brought into the House of Commons this year by the Attorney-General, which embodies Sir James Stephen's codification of the criminal law, there are improved provisions for dealing with some of the evils which attach themselves to the system of criminal prosecution by private parties, such as agreements not to prosecute and the compounding of offences; but there is no attempt to go to the root of the matter by the creation of a public prosecutor, although no further back than 1875 the Queen's Speech distinctly promised the introduction of a Bill into Parliament for this purpose. It appears from what I can make out that the chief objections to doing this are: 1. That the attorneys of England are opposed to it, as militating against their interests. No doubt, this is a serious practical difficulty; for I fancy that, as an "interest," as the phrase goes, the attorneys of England constitute a body of great influential power, exceeded,

perhaps, by none, unless it be the publicans. It is not, of course, for me to offer any advice to attorneys, who are certainly quite capable of looking after themselves as well as their clients; but I see no reason why it should not be as good an object of ambition to an English attorney to be selected as local agent for the public interest in criminal matters, as it is to a provincial legal practitioner in Scotland to be made a procurator-fiscal. Of course, the rest must be disappointed, but they may usefully exercise their talents in conducting defences; and, though this may not be the most lucrative of occupations, I should doubt if it be greatly inferior in this respect to the work of conducting average prosecutions at the instance of private parties, even with the advantage of having security that at least some of the expenses will be repaid from the public funds.

The second objection which I have seen urged, which was prominently brought before the Select Committee by Lord Campbell, is that the existence of a public prosecutor might be an interference with the independence of the Bar, "because, if this patronage were vested in the Crown, no one could hold a brief in a criminal court, except by favour of the Attorney-General, or any person who had this patronage in his possession." This is also insisted on by Sir James Stephen upon somewhat different objections which are not experienced in Scotland. Surely a young barrister may, with perfect conservation of his independence, aspire to being selected as Crown counsel from his showing, say by an ably pleaded defence, that he is well versed in criminal law. I should not dare to insult the English Bar by supposing it would lose its independence under any system, and he would be a bold man who would step into the Parliament House, the Palais de Justice, or the Four Courts, and tell the Bars of Scotland, France, and Ireland that they have not had independence during the period (in the case of the two former extending to centuries) in which the office of public prosecutor has existed among them.

The other objection which has been urged against the establishment of a public prosecutor in England is the expense. Every one must be ready to admit that what may be worked without undue outlay in a small country like Scotland may involve financial considerations in England which render it unadvisable. When, however, I consider that prosecutions by individuals "bound over" are, to a certain extent, paid for by the State; when I consider that, in a regularly organized system, economy can always be more or less rigidly enforced, I fancy this question of expense may possibly be found to be much more serious in the apprehension than in the reality.

But, even if this idea were utterly wrong, if the expense of criminal prosecutions were to be greater than the broadest estimates calculate, let us have speedy and effectual action for the repression of crime, whatever we pay for it. The fact is, that this grumbling

as to expense is at the bottom of most of the difficulties we have in the matter. The prompt and secure administration of justice is an expensive article, and, if we will have it, it must be paid for. Let us, as a professedly Christian nation, economize in some of our other departments of expenditure to do what is right in this. I wish that those laborious, noble, and right hon. gentlemen who superintend our military expenditure, for instance, could see their way to lessening the expense without impairing the efficiency of our armaments, and enable us to save something from the apparatus of war to expend upon the apparatus of justice. I am told that every shot fired from a 38-ton gun costs at least £12. I do not ask for twelve guineas for a *post-mortem* examination; but a shot saved now and then would, at the rate of two guineas each for two medical examiners, pay for three *post mortems*, and, to my mind, the money would be well expended. Do not mistake me and think that I am here indulging in a sneer at "bloated armaments." I annex most sternly the condition "without impairing their efficiency" to any economies to be practised regarding our navy and army; but let us beware of being proud of the money we spend in making Britain, as she is, the foremost power in the world, whilst we are unwilling to spend money in making her an example to other nations of a prompt and sure administratrix of justice.

Of many of the evils mentioned as adhering to the system of prosecution by private parties it does not become me to speak, because they are purely legal evils; but there is one which was very broadly stated by Lord Chief-Justice Cockburn, then Attorney-General, which more strictly concerns us. I beg to remind you of his Lordship's words formerly quoted. "Cases are often brought to trial which, from being imperfectly got up, break down, and thus cause the acquittal of guilty parties." No one need be surprised at this. The attorney acting for a private party, with only a limited guarantee for the repayment of his costs, will, according to the prudential proverb, not put his hand further out than he can draw it back with safety, and will not lead evidence that will be expensive and which may entail a loss upon him. Medical evidence is exactly of the expensive kind, if fairly paid for (which it generally is not), and this outlay he will naturally shirk from incurring, if he possibly can. The public prosecutor, who certainly ought always to be under strict and searching audit, is not under any such considerations, and will take pains to have good scientific evidence, although it may entail some expense on the nation. His official character, nay, his retention of his appointment, may be at stake if he do not get up his case thoroughly, and the auditing authorities at headquarters (at least such is our experience in Scotland) will be ready to pass his accounts when they see that he did what was needful to make good his case, and when they know that he, paid as he is with us by fixed salary, can have no object to serve in leading expensive evidence, excepting a desire to do his

duty in vindicating the offended majesty of the law. Does this which I now complain of—the imperfect getting up of cases involving scientific evidence—exist now or not? You who, either from your personal observation or from local newspaper reports, are conversant with the details of criminal cases occurring in your neighbourhoods can answer this question better than I can; but this I can say, that, far as I am from the seats of English assizes, I every now and then see cases which prove to me that, in respect of calling medical evidence, criminal cases are most imperfectly conducted. I will not attempt to cite a number of instances; I allude only to one, and into the particulars of it I shall not go, because I have already inflicted on the members of the Association my ideas thereanent in the shape of two columns of the *British Medical Journal* regarding it. Some of you may remember it. It was a case where a man was accused at the Cornwall assizes of attempting to administer—for what immoral purpose you can imagine—cantharides to a young girl. What was the medical testimony led in this case, which involved the physiological action of a notoriously noxious drug? It was that of a druggist, and his scientific evidence consisted in quoting, disjoined from its context, a passage from Taylor on Poisons. The result was an acquittal and a grievous miscarriage of justice, and all because the attorney who got up the case did not call any one average practitioner (for it required no learned expert) to prove that a grain and a half of cantharides might "injure, grieve, or annoy" the person who swallowed it. In last week's *British Medical Journal* I see a case where an indictment for an attempt to procure abortion failed under a ruling of Lord Justice Thesiger, against which I take no exception, that, as the pregnant woman who took the drug was herself a *particeps criminis*, and her testimony being unsupported by other evidence, he could do nothing else than order an acquittal. It is entirely unintelligible to me that, under proper investigation, some idea should not have been got as to what was the drug administered (perhaps this is known; it is not stated in the *Journal*); and that a medical witness should not have been got to speak as to what is known as to the said drug being one likely to be employed under the idea that it would procure abortion. As it was, there was forthcoming no such corroboration, which was all that was wanted, and thus the midwife, who is apparently one of those wretches who live by this abominable traffic in fœticide, escaped conviction. It may be, for aught I know, there may have been no possibility of knowing what the drug was, and of getting its supposed action spoken to by a medical man; but, if this be true, the case ought never to have been brought to trial at all. A public prosecutor, in such a state of matters, if truly conscious of what is best for the ends of justice, would have entered a *nolle prosequi*, knowing that a form of trial without a shadow of good evidence to support the prosecution is only an encouragement, instead of a deterrent, to evil-doers. Gentlemen, let me urge upon

you, as members of the profession most frequently called upon to give scientific evidence, to do what you can in your several spheres, in urging upon our legislators to give to you in England, what every other European country and America have the advantage of possessing—a functionary to carry out the principle that was announced by the Right Hon. Joseph Napier before the Committee in 1855: that "the executive government is properly, I would say primarily, charged with the security of society; that the security of life and property belongs peculiarly to the executive government; and that all prosecutions ought to be conducted by responsible officers."

The other great distinction between the initial proceedings for the detection of crime in England and Scotland consists in the existence in England of the Coroner's Court, which among us is utterly unknown. It is upon the coroner that have been concentrated most of the discussions among medical men as to criminal proceedings, and all of you who read the medical journals are painfully aware of how many editorial articles, letters with and without the writers' names, and conferences in Social Science Congresses, have been showered upon the head of this functionary. I have read a good number of these, including the discussion at the Conference held under the auspices of this Association in November last, and I must honestly confess I have not been able to shake out of myself the feeling that, as it now exists, the Coroner's Court is an anachronism and an anomaly. It is an anachronism because, though it may have been well suited for the time of the Plantagenets, in which it first took shape, it is unsuited to the requirements of the present day. As originally constituted, its main dependence was upon the fact that the jury was, not merely theoretically but practically, composed of the neighbours of the dead man, whose personal knowledge of him was expected to supply some of that information regarding the probable cause of his death, which medico-legal science, then not in existence, can now supply with some degree of certainty. It is an anomaly, both as regards the mode of election of him who presides over it, the want of security for his possessing the kind of knowledge which is often required, and the limited and circumscribed area over which his jurisdiction extends. I shall not discuss at length the mode of election. The idea of appointing a man to an office essentially judicial by the votes of independent freeholders of the county, or any such kind of constituency, appears to me to be indefensible. I can easily understand that gentlemen who have received such appointments will not readily adopt this opinion, and give a slap on the face to those to whom they have owed their elevation; but I cannot conceive any one patting the freeholders on the back and saying, "You are the people to elect a man to preside over a court of any kind." The election, like that of other judges, should rest with a responsible minister of the Crown. The coronership as it now exists is an anomaly, because there is no security for the

person appointed possessing the necessary qualifications for the office. Say what you like, it is essentially judicial. It has to deal with questions pertaining to one of the most difficult branches of the law—the law of evidence; and I am not persuaded by statements I have seen confidently made, that any one—for instance, a medical man—may very easily and speedily acquire all the knowledge of the law of evidence which a coroner requires. I can as easily believe that a clever barrister may easily and speedily acquire an adequate knowledge of the laws and pathology of sudden and violent deaths. A medical man who may have to give evidence in a court of law will, if he be properly instructed, gather from his teacher of forensic medicine some hints as to the law of evidence which shall keep him from the mistake which has been committed of putting into his reports, or attempting to bring out in his *parole*, testimony which might be held by the judge to be inadmissible as evidence. A lawyer, if, as I hold should be the case, he be properly educated, ought to learn enough of medical jurisprudence to prevent him from misunderstanding what is the object or meaning of a medical man's testimony; but neither of them should suppose that thereby he should take upon himself the function of the other. The lawyer on the bench and the doctor in the witness-box—there you have, in my view, the right men in the right places.

You will see, from these remarks, that I am no supporter of the view that coroners should be selected from the medical profession. You will not, of course, suppose from this that I mean to hint that a medical man must necessarily make a bad coroner. There are many estimable and most efficient members of our profession who have held or do hold the office of coroner. To my mind, if they have been successful, it has not been because of, but in spite of, their being medical men. Nor will you, I trust, accuse me of being disloyal to our noble profession; it is out of loyalty to her I make these remarks. In every instance of those inquiries which the coroner makes, there ought to be, at the earliest of such proceedings, a medical man in the case; but I do not want to see the medical man climbing into the coroner's seat, because I wish him to take his place on a higher platform. I wish him to be, not the coroner, but the coroner's instructor, his "guide, philosopher, and friend;" and this, to my mind, is the truest loyalty to our profession.

I say nothing as to the strange anomalies which adhere to the power and to the effect of the proceedings in the coroner's court, but content myself on this point with citing what has been said by Mr. Herschell, Q.C., M.P.:—

"But notwithstanding that proceedings are pending in the coroner's court, or even that an incriminating verdict had been found there, the accused person is none the less taken before the magistrate that the facts may be inquired into, and the case dealt with in the ordinary way. There an entirely independent investigation takes place, resulting either in a remand for trial or the dis-

charge of the accused person. If he be discharged as being entirely free from blame—which not unfrequently happens where a coroner's jury have found a verdict of manslaughter—he must all the same retain the prisoner until the next assizes, or put him under bail to appear then and take his trial, although it is, practically speaking, a certainty that in such circumstances he never will be tried. If the magistrate commit and the grand jury find a true bill, it is on this indictment he is tried, and if acquitted no evidence is offered on the coroner's inquisition. If, though the magistrate commit, the grand jury should find no bill, it has become the regular routine for the prosecution to offer no evidence on the coroner's inquisition, and in effect to accept the counter-determination of the grand jury as overruling it. It will thus be seen that though in theory, and no doubt in ancient times in practice, a trial of the accused resulted, as a matter of course, from the verdict of the coroner's jury, this is no longer the case. It follows now upon quite independent proceedings, pursuing entirely the same course as criminal proceedings do in cases not coming within the cognizance of the coroner's court. Surely you have here both anomaly and practical mischief. You have two separate tribunals for the purpose of determining whether a man is to be put on his trial, fulfilling their functions at the same time, but quite independently of one another, and arriving, it may be, at conflicting conclusions."

But I have said also that, as it at present stands, the coroner's court is an anomaly as regards the limited and circumscribed area over which his jurisdiction extends. I mean, of course, medico-legal, not territorial, area. Why should there be a tribunal whose function is limited to the investigation of cases where there has been a death, and which can take no cognisance of cases where carelessness as culpable, or violence as brutal may be brought to light, as in any which involves the question of manslaughter or murder? No doubt cases involving a death are of the gravest character, because they may end in a capital punishment; and on the theory that the coroner's is a higher and more scientific court, the referring of the gravest cases to it is intelligible. But in this view of it, why is the magistrate to deal with the same case, nay, in certain instances to override the decision of the coroner and his jury? One or other of these proceedings is superfluous, as Mr. Herschell and others have told us. If it be the theory that cases involving a death are more difficult of accurate solution than those that do not, and that they therefore require the intervention of the coroner in addition to the magistrate, I venture to dispute the proposition. We need the same kind of evidence and the same correctness of observation, to determine whether the injuries on a living person were due to an accident on his part, or an assault by another, as we require to determine whether or not a certain wound caused death. We need the same logical analysis of symptoms,

and it may be the same delicate chemical research, to determine that there has been an unsuccessful attempt to poison, that we require to put in force when the result has been fatal. Nay, in many instances where the injured party is alive, you have an element of difficulty added which does not exist where the inquiry refers to death. A dead body tells no tales, except those which it whispers to the quick ear of the scientific expert,—by him to be reported in the proper quarter. A living body has a living tongue in its mouth, and that tongue may be a lying one, ready either from vindictive feeling to have recourse to the *suggestio falsi*, or from fear of consequences to adopt the *suppressio veri*, and it requires certainly no less, rather it calls for more, acuteness and discernment on the part of the authority who investigates, or the medical witness who testifies, to follow the scent of the truth, when there may have been a string of mendacious red herrings drawn across it.

You see, therefore, I am for extending the jurisdiction of the coroner, not limiting it. But if you extend it to all sorts of personal injury, fatal or non-fatal, and thus give him the office and power of the stipendiary magistrate, why not stop there, or why not extend it to other offences which involve no medical considerations? And what is this but bringing us back to where we were some time ago? Why not make what you now call the coroner local public prosecutor? You may retain the time-honoured name of coroner or not. It has at all events an intelligible etymology, and is at least as appropriate a title as that of Procurator-Fiscal, who is the analogous functionary in Scotland. I need hardly repeat that such functions are, of course, work for the lawyer, not the doctor. Do I mean to set aside my professional brother as of no use? Quite the contrary; I reserve for him his proper professional work, and point him out as the indispensable adviser and guide of the public prosecutor in every case where medical considerations are at all involved. I am persuaded that if this principle of the proper division of labour were adopted in England as it is in Scotland—the lawyer to conduct the investigations, the doctor to be the interpreter of the medical questions which arise—there would be a solution of many, if not of most, of these difficulties, of which so much is said as to the office of coroner.

The chief of these—for I have not time to look at the half of those which have been propounded—relates to the difficulty of getting properly qualified men to furnish the necessary evidence. This difficulty has two roots: one educational, the other financial. If you find that the medical profession cannot furnish, readily and easily, men qualified to make and report a *post-mortem* examination, let the various graduating and licensing bodies lay it to heart, and see that the rising generation of doctors are ascertained to have attended to the subject of pathological anatomy, and I am much mistaken if this is not already being done by all licensing bodies worthy of the name. But even supposing that the bulk of

the profession were as ill furnished with pathological information as any man can fancy, I maintain that you can easily command the services of competent men if it were not for the financial difficulty. I do not believe there is any place so out of the way in England that you could not, in a few hours, bring to the spot a man well qualified to make a *post-mortem* examination. The telegraph and railway will do it for you, but you must pay him. I ask no extravagant fees; nothing like what a man would rightly exact who is called to a consultation, but at least in some measure pay him as you would a professional gentleman, and not as you would an artisan. Let me, however, say a word to the profession on this point. Do not be too exacting; do not expect to make money by medico-legal work; but with even a comparatively slender remuneration be content, and console yourself for small payment with the reflection that you may thereby personally gain repute, and that you are showing to your country how truly a scientific profession, how far reaching in its influence, that of medicine is.

You will say, But how is the prosecution to know where to find this qualified man, if it be willing to pay for him? I can understand the difficulty under the system of prosecution by private parties. A solicitor, who is only now and then, perhaps at rare intervals, called upon to carry out a prosecution, may readily be at his wits' end, and may very likely select the wrong man; but the public prosecutor, who is constantly engaged in the investigation of suspicious cases, will soon come to learn the character of the medical men within his call, as he will, through his myrmidons, come to know the character of every thief and poacher in the county. He will make it his business to be informed about these doctors. His first precognition of a medical man will show him whether the doctor is or is not a well-informed man, capable of answering questions in a clear and ready way, capable of expressing himself distinctly; in short, whether he is a good expert and a good witness, and if he be not up to the mark he will not have any more to do with him. There is no need, in my opinion, for the official, be he coroner or what you will, having a special appointment made of a man to be always called upon, or even a special list, from which he must make his selection. He will naturally turn his eyes to the man in such a position as that of a medical officer of health or medical officer of police, and, if he find him a good man and true, will have recourse to him; but there is no need for a special appointment. For more than thirty years I have been constantly engaged in conducting investigations and giving medico-legal advice to our Crown authorities. Successive Lord Advocates, with their retinue of Solicitors-General and Advocates-Depute, have been pleased to continue their confidence in me. I do not hold and never have held any formal appointment, and they are at perfect freedom, and it is right they should be so, to go to any one else when they think he can serve them better than I can.

Although holding no formal office under the Crown, I am in no dubiety as to getting my due honoraria. No procurator-fiscal can call upon a special expert, for instance, by sending him articles for analysis, on his own authority. These must always come through the Crown Office, to which I look for my fees, and I have no reason to complain of my remuneration for this kind of work. It rests with myself if I am underpaid. I and all my brethren, however, do complain of the Exchequer rules regarding payment for attendance at trials. To allow a medical man only two guineas a day and railway fares for attending a Circuit Court is simply disgusting. Who "my lords" are who are obdurate in this matter I do not exactly know, but I know it has been remonstrated against, not only by medical men themselves, but by Crown counsel who have occasion to call them as witnesses. Nor have the Crown authorities any difficulty in conjoining with me, or substituting for me any man who they have reason to believe has a special knowledge, of which it is advisable they should avail themselves. I have ever found them ready to adopt any suggestion of mine to call in a special expert, when I wished my opinion in a difficult case to be confirmed by other testimony. Is there any reason why this should not be done in England? If not, which I believe to be the fact, why these complaints from legal coroners and others as to the difficulty of getting properly qualified experts? If there be, what can make the difference between my country and yours, excepting the existence among us of the public prosecutor.

And now, gentlemen, since, by a rather tedious journey, we have got to Scotland, let us for a moment glance at the initial investigation of a suspicious case as it is conducted there. I suspect there are very false ideas abroad in England respecting it, and I do not find that your legal writers, who are the proper people to do so, have taken any special pains to dispel them. It is to me rather remarkable that such a writer as Sir James Stephen, in his "General View of the Criminal Law of England," should give an elaborate comparison of the English and French systems, but should take no more notice of the system of Scotland than if our "land of brown heath and shaggy wood" had never had a place in civilized Europe. In Scotland, the investigation of every kind of case, whether obviously criminal or only suspicious, the inquiry into deaths attended with suspicious circumstances, or deaths from accident, or cases of sudden death, is conducted by the Procurator-Fiscal. We need here concern ourselves only with inquiry into deaths and offences against the person. This functionary has for his guidance not only the law of the land, to which of course he must conform, but he has the advantage of a carefully prepared code of instructions, drawn up by the Lord Advocate, and issued from the Crown Office to every procurator-fiscal. This code of instructions was first issued as far back as 1824, and the edition at

present in force is the third, and bears the date 1868. It contains *inter alia* an appendix of fourteen folio pages, furnishing detailed directions to medical men for the making of *post-mortem* examinations; such an appendix having been first added to it in 1839 and revised in 1868. It is not for me to characterize these directions, as I had the honour of being associated with Sir Robert Christison and the late Professor Syme in drawing up the existing edition. Suffice it to say that, besides general regulations for the external and internal examination of a body, it contains special directions for making such examinations in the several cases of wounds and bruises, poisoning, asphyxia in its various forms, burning, criminal abortion, and infanticide, so that it not only forms a guide to medical examiners as to the points to be specially observed, but enables the Procurator-Fiscal to know what he has a right to expect in the report of the dissection. When any circumstance, showing a death to be unexpected or ill explained, comes to the knowledge of the Procurator-Fiscal, he is bound at once to make inquiry; and, unless this is *primâ facie* satisfactory, he has to proceed to take a precognition. To effect this, he presents a petition to the Sheriff of the county, praying for the authority (which is almost invariably granted) to cite the necessary witnesses. Where a death is not clearly accounted for (for instance, by the testimony of the medical man who knew the case), he has to get a written report from a duly qualified medical man; and where a *post-mortem* examination is necessary, and the circumstances are suspicious, two medical men are always employed. The whole of the documents are then forwarded to the office of the Crown Agent in Edinburgh, and are by him at once put into the hands of the Advocate-Depute in charge of the district in which the case occurred. If the Advocate-Depute is satisfied that there is no suspicion of crime, he marks on the paper "No proceedings," and the case is at an end; and it is now the duty of the Procurator-Fiscal to furnish the registrar of the district with the due certificate of the cause of death, that it may be entered in his books. If the Advocate-Depute is of opinion that there is a suspicion in the case, he sends it back to the Procurator-Fiscal for further investigation, or if any one be in custody, he orders him to be committed until liberated in due course of law. If there be doubt or difficulty as to how the case is to be dealt with, the Advocate-Depute brings it before the other Crown officers, who are the Lord Advocate, the Solicitor-General, and other three Advocates-Depute. The result of this consultation may, of course, be to put an end to the proceedings; or, on the other hand, to order the case to be completed; and when this has been done with this view, the whole documents *in causâ*, precognitions of witnesses, and scientific reports are returned to the Advocate-Depute, who, in consultation with the other Crown counsel if necessary, draws up the indictment and attends at the trial as counsel for the prosecution. In cases which, either from their *locus* or from their importance, are tried at the

High Court of Justiciary, the Lord Advocate himself, or the Solicitor-General, or both in conjunction with the Advocate-Depute, conduct the case in court, the Crown Agent and the Procurator-Fiscal, with whom the case originated, officiating as solicitors for the prosecution. The proceedings in a Scottish criminal court do not differ essentially from those in England, except in this respect that, whilst in England all the witnesses may be in court and hear the testimony given before they are examined, the witnesses in Scotland are excluded until called for. But, in special circumstances, alike in civil or criminal cases, the Court may be asked to permit the scientific witnesses to be present while the general evidence is being taken. I am not here to make a laudation of the practice of my own country, but to give you, as clearly as I can, a narrative of it; but I think, in reference to these preliminary inquiries as to suspicious or sudden deaths, I may fairly say that a body of gentlemen such as Crown counsel, all accustomed to weigh evidence, and who have been taught forensic medicine, discussing the evidence in official chambers, is at least as likely to form a correct judgment as to whether there is or is not a crime to be traced out and punished, as a coroner's jury of twelve men, sitting in a public-house; and certainly the example of holding a judicial inquiry in such a place, by which I observe many persons are greatly exercised, is unknown north of the Tweed.

None of these inquiries by the authorities are, you observe, conducted in public. Upon this subject I shall presently say a single word, but in the meantime I allude to it for the purpose of remarking that from people seeing in Scottish newspapers notices of sudden deaths, or of persons found dead, and seeing no reports in the public prints of the investigation of them, are apt to conclude that they are not inquired into at all. In a memorandum addressed by Dr. Alfred Taylor to the Conference in November last, he says, "There is no reason to believe that crimes escape detection under the Scottish system more than under the English. On the contrary, experience seems to show that under the English practice it is more likely to remain undetected." I can, I think, give my esteemed friend, now enjoying an honourable retirement from his useful labours in the field of medical jurisprudence, some assurance on this point. I know of no system under which it would be impossible for a criminal to escape; but I am, on the other hand, sure that under our Scottish system, in conjunction with our well-organized registration, it is extremely difficult. But, in reference to the question as to whether due inquiry is made regarding sudden, or suspicious, or accidental deaths, I prefer quoting figures to making general statements. Now I find, from a return made by the Crown Agent to an order of the House of Lords, that in the years 1875 and 1876 respectively, the following were the numbers of cases which were made the subject of precognition by the Procurators-Fiscal. In 1875 there were 2516 precognitions, referring to 2579 deaths; in 1876,

2606 precognitions, referring to 2791 deaths. But this is exclusive of cases which from the first were connected with charges of murder or culpable homicide, which amounted to, in 1875, 88 investigations, referring to 97 deaths, in 1876, 92 investigations, referring to 97 deaths. I think we may gather from these numbers that the making of such investigations is not neglected in Scotland, when we bear in mind that the estimated population of the whole land in 1876 was only three and a half millions—not so great as that watched over by the London police.

I have hitherto spoken of these investigations without any reference to the way in which Scottish procedure deals with persons when suspected or accused of crime. This does not directly involve medical considerations; but I must say a few words regarding it, and I am quite prepared for your looking upon me as especially heterodox, when I speak with approbation of the system of secret, or rather let me call it non-public, inquiry. I respect the attachment to the love of fair play which characterizes Britons, whether it refer to sharp dealing with a prisoner in the dock, or to the enormity of shooting a hare in her seat; but in a matter of this kind we must not be guided by sentiment, but look at it with a practical eye, and ask whether the secret inquiry (I purposely use the more offensive expression) is the best for the furtherance of justice. By this I do not mean whether it best conduces to the procuring of convictions; I mean whether or not it is fairest for justice on the one hand, and on the other to the inculpated party, be he innocent or guilty.

I have my own ideas of its bearings upon justice, and am by no means sure that a public preliminary trial before a coroner or a magistrate, or both, may not tend to defeat justice by leading unscrupulous people, when they see a "pal" in trouble, to fit their evidence to the requirements of his case and do a little astute business in the way of perjury. I rather like to look at the secret inquiry in the interests of the accused; and, provided it is guarded by due securities, it seems to be in his favour—at all events, not to his disadvantage. On these securities I cannot enlarge, they are not peculiar to Scotland. There is, for instance, with us the provision that the public prosecutor, who has no fear of prosecution for wrongous imprisonment or false accusation, can by the accused party be compelled, by a process called running his letters, to bring him to a final trial within a limited period. There is the provision that the public prosecutor cannot spring a mine upon the accused in the way of unexpected evidence, because the indictment which is served upon him must contain a list not only of all witnesses who are to be brought against him, but of every report or other document—yea, of every article, be it a bottle or a rag—which is to be exhibited by the prosecutor; and, as all the witnesses for the Crown are also witnesses for the defence, he is entitled to, and almost invariably takes care to, have them duly

precognosced for the defence. What I most dislike is the effect of a public inquiry, fully reported as it is by the press, on the minds of those who are to make the jury at the final trial, where, it may be, the life or death of the accused may be trembling in the balance. "Give a dog a bad name and hang him" is a proverb with a great deal of truth in it. It is all very well for the judge, in his summing up, to tell the jury that they are to decide only upon what has been sworn to in court, and are to discard all impressions which have been made upon them by what they have heard previously. Under a secret inquiry, they have heard nothing previously; they know nothing of what is to be proved until it *is* proved. If from the newspapers they have heard previously of a murderer's schemes and of his antecedents, which are generally none of the best, can they, with every conscientious desire to do so, shake themselves free from all bias against him? I do not know how it may be elsewhere; but of this I feel convinced, that in the recent great murder case (Chantrelle) which we had in Edinburgh, if all that was ascertained by precognition had been published in the newspapers, you could not have found fifteen men to form a jury totally unbiassed against the wretched man who has passed from the bar of a human tribunal to the judgment-seat of the Eternal. My belief is that, guarded as it now is, private inquiry is the best for all parties.

But, supposing it turned out that there is no crime at all, why should any person, say the last one seen in company with the deceased, be dragged before the public when he is quite innocent, nay, even if his conduct, when inquired into, may involve doings which, though not criminal, are much to his discredit, such as intoxication or other immorality? It is right that he should pay the penalty of his sins, but not in this way. It is very easy to let the idle portion of the public, always agape for any gossip or scandal, know that a man has been under suspicion of having been guilty of a crime; but, though you prove him innocent, you do not easily free him from the unjust loss of character which this may involve, or deliver him from the inevitable *monstrari digito*. I could, from cases which have come under my own cognizance, fully illustrate the hardship to individuals which may follow from these inquiries being made in public.

Do not go away with the impression that I regard the Scottish system as perfection. There are several *lacunæ* in it which I should like to see filled up. One, for instance, is that the death-registers should be inspected, say, once a week by a medical man; not for statistical purposes, but with a view to seeing that all the causes of death are clear and free from all element of suspicion, and, when this is not the case, at once to direct the attention of the local public prosecutor to the case, so that it may be investigated without loss of time; another is that it should be made imperative on all candidates for the office of Procurator-Fiscal to follow the ex-

ample of the barristers, and attend a course of instruction on forensic medicine. Most of the present occupants of the office have, I believe, done so; but there is no security for this, and the Sheriffs, with whom, subject to the approval of the Home Secretary, this patronage now lies, should make this a necessary qualification. I must not, however, go further into details.

Gentlemen, I have to apologize for having detained you so long. I cannot expect you to accede to my opinions, but all I ask of you is, that you should, as Englishmen, not look askance on a system of criminal jurisprudence which is geographically separated from your own only by the Tweed and the Cheviots, and from which, whether regarded from a medical or legal stand-point, permit me, as a Scotchman, to say I think English jurisprudence might usefully take a hint or two.

JUDICIAL PROCEDURE IN WINDING UP AND LIQUIDATION OF COMPANIES UNDER THE COMPANIES ACTS, 1862 AND 1867.[1]

BY Æ. J. G. MACKAY, ADVOCATE.

1. *Mode of Treatment.*—The dependence of so many cases before the Court of Session connected with liquidation under the Companies Act, 1862, and to some extent the absence of an Act of Sederunt regulating the procedure in such cases, may make it convenient for practitioners to have a short statement of this procedure so far as settled by the Act itself, or by the English practice, which will no doubt be followed so far as applicable to Scottish forms of process. It is not proposed, however, to cite the English decisions, except in a few instances, as they all may be found in the fourth and last edition of Mr. Justice Lindley's "Treatise on Partnership," to which frequent reference will be made. The whole Scottish decisions which have been, and some which have not been, reported on questions relative to procedure are, it is believed, quoted. It must be kept in view that in England the jurisdiction conferred by the Act is under § 23 of the Judicature Act, 1873 (36 and 37 Vict. c. 66), now vested in the Chancery Division of the High Court of Justice, and that any judge of that Division may exercise any jurisdiction which was prior to the Judicature Act exercisable by a single judge, for in such cases "any judge sitting in Court shall be deemed to constitute a Court" (36 and

[1] This account of Liquidation Procedure, which will appear in volume ii. of the Court of Session Practice, is printed here as it may possibly aid in the practical application of the Companies Acts in the Scottish Courts, and in the hope that any one who has brought under his notice important decisions with regard to the procedure clauses of these Acts may give a note of them to the writer. It is scarcely possible for the Reports to include all Practice Decisions of value as precedents, but it is of importance to the profession that a record of them should be preserved.

37 Vict. c. 66, § 39). As the winding up and liquidation of companies was prior to the Judicature Act conducted in the first instance in the Courts of the Vice-Chancellors and Master of the Rolls, it may still be and usually is conducted in the first instance before one of the Judges of the High Court, from whose decision an appeal in most cases lies to a Divisional Court of Appeal, and from that Court to the House of Lords. At present the only Court having jurisdiction in Scotland is either Division of the Court of Session, and the appeal is therefore direct to the House of Lords.

2. *Proceedings under the Companies Act*, 1862, *for Winding up.*—The judicial proceedings which it is necessary to consider with regard to joint-stock companies are statutory, and they are now almost exclusively regulated by the Joint-Stock Companies Act, 1862 (25 and 26 Vict. c. 89). That Act has been in some points amended by the Joint-Stock Companies Acts, 1867 (30 and 31 Vict. c. 12) and 1877 (40 and 41 Vict. c. 26), but these Acts touch judicial procedure only in so far as the former Act has introduced an application to the Court by petition for confirming a special resolution as to reduction of capital (30 and 31 Vict. c. 131, § 10).

On the rights and liabilities of the partners and directors of such companies, and the rights of their creditors, information must be sought in the standard treatises on partnership,[1] which the profession has the good fortune to have had provided by an eminent member of the English High Court of Justice and by the Sheriff of Lanarkshire. The work of Mr. Justice Lindley treats Liquidation more in detail than that of Sheriff Clark, and will be most frequently referred to. Its exhaustive character is common to it and many other English law-books; but the lucid order which it has given to a somewhat complex subject places it in a more select class, and is perhaps due to the fact that its author is not only an English lawyer of large experience, but also a lawyer thoroughly educated in the principles of jurisprudence.[2]

3. *Three Modes of Winding up.*—There are three modes by which a company may be wound up and its debts liquidated under the Companies Act, 1862:[3] (1) Voluntary winding up by the Company itself (§ 129);[4] (2) winding up by the Court, or compulsory winding up (§ 79);[5] (3) winding up under supervision of the Court in continuation of a voluntary winding up (§ 147).[6]

4. *Winding up by the Company itself.*—The first mode, or voluntary winding up, is conducted, except in a few special cases afterwards specified, by the company itself or liquidators appointed by

[1] Lindley on Partnership and Companies, 4th ed., 1878; Clark on Partnership. These works are throughout referred to under the letters L. and C. The references to sections are to the sections of the Companies Act, 1862, if not otherwise mentioned.

[2] Mr. Lindley's first work, "An Introduction to Jurisprudence," 1855, founded upon Thibaut's "Pandekten," is not so well known as it should be.

[3] L. p. 1226. [4] L. p. 1458 *et seq.* [5] L. p. 1237 *et seq.*

[6] L. p. 1471 *et seq.*

it. It is applicable only to registered companies, and consequently unregistered companies can only be wound up by the Court.[1] No petition for winding up the company is necessary; creditors are not, unless the Court on special application so order, restricted in their right to bring actions or do diligence against the company;[2] and the liquidators may without the sanction of the Court exercise all powers given by the Act to the official liquidator, including the settling of the list of contributories and making calls.[3] Such liquidators, however, have no power to enforce payment of calls without judicial assistance.[4] This assistance may be procured by ordinary action in name of the company, which does not differ from other petitory actions, or where the contributory is already settled on the list[5] by petition to the Court under § 138. Under that section an appeal to the Court is competent to determine any question or to obtain any power which it may become necessary to decide or obtain in the course of a voluntary liquidation. It provides: "Where a company is being wound up voluntarily the liquidators or any contributory of the company may apply to the Court in Scotland, or to the Lord Ordinary on the Bills in Scotland in time of vacation, to determine any question arising in the matter of such winding up, or to exercise, as respects the enforcing of calls or in respect of any other matter, all or any of the powers[6] which the Court might exercise if the company were being wound up by the Court; and the Court, or the Lord Ordinary in the case foresaid, if satisfied that the determination of such question or the required exercise of power will be just and beneficial, may accede wholly or partially to such application on such terms and subject to such conditions as the Court thinks fit, or it may make such other order, interlocutor, or decree on such application as the Court thinks just."

Although an appeal to the Court in a voluntary winding up is thus always competent, the only cases in which such an appeal is necessary appear to be: To appoint a liquidator where none has been appointed by the company itself (§ 141); to remove a liquidator and appoint another on due cause shown (§ 141);[7] to confer upon the liquidators any of the powers as respects the enforcing of calls or otherwise which the Court might exercise if the company was being wound up by the Court (§ 138); to empower the liquidators to prosecute directors, managers, officers, or members of the

[1] L. p. 1460. See § 199 (2).

[2] *Sdeuard* v. *Gardner*, 10 March 1876, 3 R. 577; L. p. 1468.

[3] See § 133 (7,) (8,) (9). [4] L. § 1469. [5] L. p. 1470; Rance's Case, 6 Ch. 104.

[6] "The true construction of the section is that the Court is to enforce orders for payment of calls, and other orders of the same kind. The enforcement of calls is regulated by § 121. Sections 115, 117, and 118 confer similar powers. All these provisions, we can see very well, are just as useful and applicable to a voluntary winding up as to a winding up by the Court."—Opinion of Inglis, L. P., in *Sdeuard* v. *Gardner*, 3 R. 583.

[7] L. p. 1462. It is not essential to prove misconduct or unfitness to procure the removal of a liquidator (British National Assurance Co., *ex parte* Henderson, L. R. 14 Eq. 492).

company (§ 168);[1] to fix a time within which creditors will be excluded who do not prove their debts (§ 107).[2] Where any of these cases occur the procedure is by petition to the Court in one of its Divisions. As the other procedure is conducted, unless in exceptional circumstances, extra-judicially, it is not proposed to refer further to voluntary liquidation.

5. *Winding up by or under Supervision of Court. Jurisdiction of Court of Session.*—The procedure in winding up by the Court and in winding up subject to supervision of the Court is in most respects the same or similar, but it is necessary to consider these separately, as this is done in the Companies Act, 1862; and, first, of winding up by the Court, or compulsorily.[3] The Court for winding up is in the case of companies registered in Scotland (§ 81), or if not registered, having a principal place of business there, and that whether the winding up is by or under the supervision of the Court, the Court of Session, in either Division thereof (§ 199 (1)).

6. *What Companies may be wound up.*—The companies which may be wound up are[4]—(1) All companies registered under the Act of 1862, whether formed under it or not (§ 79, 80, and 196); (2) all companies registered under the Companies Acts, 1856-1858 (§ 176, 177, and 196); (3) all other (*i.e.* unregistered) partnerships, associations, or companies (except railway companies incorporated by Act of Parliament) consisting of more than seven members (§ 199).

Notwithstanding of the generality of the terms of the 199th section, the tenor of the Act shows that certain corporations, societies, and partnerships cannot be wound up under its provisions. Such are municipal corporations, ecclesiastical corporations, societies incorporated by royal charter for the advancement of science,[5] and ordinary clubs.[6] It is doubtful whether unregistered mutual marine insurance societies or illegal companies can be so wound up.[7]

7. *Petition to wind up by Court.*—A petition for the compulsory winding up of a company by the Court may be presented by the company or by any one or more creditor or creditors, contributory or contributories of the company,[8] or by any of the above parties jointly or separately (§ 82).[9] The petition states the nature of the company, the petitioner's title, and the circumstances which render winding up necessary. With the prayer for a winding-up order is generally joined a prayer for the appointment of an official liquida-

[1] See Chancery Gen. Orders, Nov. 1862, Rule 51.
[2] L. p. 1469.
[3] L. p. 1227 *et seq.*
[4] L. p. 1229.
[5] L. p. 1231.
[6] St. James' Club, 2 De J. M. and J. 383.
[7] L. p. 1232. Ct. *in re* Albert Assurance Association, 13 Eq. 529, with *in re* Merchants' and Tradesmen's Assurance Society, L. R. 9 Eq. 694.
[8] L. p. 1260, and Chancery Rules, 1862 (1-5); L. p. 1586. The Court of Session has made no rules by Act of Sederunt, as it is empowered to do by § 171, which provides that "until such rules are made the general practice of the Court of Session shall, so far as the same is applicable to and not inconsistent with the Act, apply to all proceedings for winding up a company, and official liquidators shall in all respects be considered as possessing the same powers as any trustee on a bankrupt estate."
[9] But see 30 and 31 Vict. c. 131, § 40.

tor or liquidators either provisionally or to conduct the whole winding up (§ 92). It may frequently happen that more than one petition for winding up is presented, in which case, if the Court pronounces an order for winding up, it will usually be made on the petition first presented. In general the expenses of a second petition will not be allowed, but they may be where there is reason to apprehend that the first petition will be withdrawn.[1]

8. *Advertisement, Service, and Answers.*—The petition is in practice advertised in such newspapers and served on such persons as the Court may direct,[2] and when presented by the company it is served at the office of the company.[3] Answers are allowed to be lodged within a short space, but where the only point contested is who shall be liquidator, the objection should be stated verbally, and the cost of answers will not be allowed.[4] Answers when lodged are in similar form to answers in other petitions, stating shortly how far the facts mentioned in the petition are admitted or denied. If there is a material dispute as to facts a proof will be allowed, and taken by one of the Judges of the Division. The affidavits[5] required by the English rules of Court have not been introduced into the Scottish practice, and are not statutory.

9. *When Winding up commences, and its Effects.*—The winding up, when by the Court, commences at the date of presentation of the petition (§ 84),[6] and if several petitions, of the earliest.[7] After this date all dispositions of the property of the company, transfers of shares, or alterations in the status of members of the company[8] are void unless the Court orders otherwise (§ 153).[9] Even before the winding-up order has been made, the Court may at any time after the presentation of the petition, upon the application of the company, or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding against the company upon such terms as the Court thinks fit (§ 85,[10] 197, and 201). The effect of these sections is to give the Court a discretionary power[11] to restrain proceedings between the date of the petition and the date of the order.

By another series of sections proceedings against the company are *ipso facto* stayed after the order to wind up, unless the Court gives leave for them to proceed.

[1] *Graham and others* v. *Edinburgh Theatre Co.*, 20th July 1877, 4 M. 1140.

[2] C. p. 709; L. p. 1260.

[3] L. p. 1261. This is also the practice in Scotland (C. 709, *Aberdeen Provision Co.*, 19th Dec. 1863, 2 M. 385, where service was ordered upon certain creditors).

[4] *Hume* v. *Highland Peat Fuel Co.*, 27th June 1876, 3 R. 881.

[5] L. p. 1262, Rule 4 of Chancery Rules, 1862.

[6] L. p. 1269.

[7] Kent's Freehold Land Co., L. R. 3 Ch. 493.

[8] *i.e.* of course their status as members of the company, but not their status otherwise.

[9] L. p. 1270, 1271.

[10] L. p. 1234.

[11] The Court accordingly refused to exercise the power to restrain proceedings when the petition for winding up first appeared in the single bills (*Aberdeen Provision Co.*, 19th Dec. 1863, 2 M. 385).

When an order for winding up has been made, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with leave of the Court, and subject to such terms as the Court may impose (§ 87.[1] See also §§ 190 and 202). Where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the presentation of the petition for the winding up, shall be void to all intents (§ 163).[2] But it has been decided in England that the Court will not interfere with creditors who have obtained judgments against the company in actions brought by or against it as represented by its liquidators.[3] Applications for leave to continue proceedings against the company under § 87 should be made to the Court which has made the order for winding up.[4]

10. *In what Cases Companies can be wound up.*—The cases in which a registered company may be wound up by the Court are (§ 79)[5]—

1. Whenever the company has passed a special resolution[6] requiring the company to be wound up by the Court.

2. Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year.

3. Whenever the members are reduced in number to less than seven.[7]

4. Whenever the company is unable to pay its debts.[8]

5. Whenever the Court is of opinion that it is just and equitable that the company should be wound up.

[1] L. p. 1274. It is settled in England that applications to stay actions must be made to the Court in which the action depends, and not to the Court in which the winding up depends (L. p. 1275), but it may be doubted whether this would hold in Scotland. This leave must be obtained from the Division of the Court before which the liquidation depends.—*Tennant* v. *Liquidators of Glasgow Bank*, Dec. 1878.

[2] L. p. 1276. "But notwithstanding these last words, the Court has power to allow distresses to proceed where the landlord cannot prove against the company as a creditor. It is, moreover, doubtful whether any of the sections in question apply to proceedings by the Crown."

[3] *Re* Mackrill Smith, 3 Ch. 125. *Ex parte* Levick, 5 Eq. 69.

[4] See *supra*, note 1.

[5] L. p. 1237 *et seq.*

[6] See as to special resolution § 51: "Whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present in person or by proxy (in cases where by the regulations of the company proxies are allowed) at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote as may be present in person or by proxy at a subsequent general meeting of which notice has been duly given, and held at an interval of not less than fourteen days nor more than one month from the date of the meeting at which such resolution was first passed." As to what is sufficient notice of the resolution to wind up, see *Sdeuard* v. *Gardner*, 10th March 1876, 3 R. 577; *Wilson* v. *M'Germ & Co.*, 19th February 1876, 3 R. 474.

[7] By 30 and 31 Vict. c. 131, § 40, a contributory can only petition for winding up where the members of the company are reduced to less than seven.

[8] See § 80, L. p. 1239; and as to life insurance companies, 33 and 34 Vict. c. 61, § 21.

An unregistered company may be wound up (§ 199 (3))—

1. Whenever the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs.

2. Whenever the company is unable to pay its debts.

3. Whenever the Court is of opinion that it is just and equitable that the company should be wound up.

No winding-up order is pronounced unless the company is in one or other of these positions, but although it is, the Court exercises a discretion in determining whether it shall be wound up. On a petition by a creditor with an undisputed debt, where the company is insolvent, a winding-up order will be generally made; but even in such circumstances the Court may prefer to order winding up under supervision to winding up by the Court.[1] When the petition is by contributories, the Court considers the more general question whether it is for the benefit of the shareholders as a whole that the company should be wound up compulsorily.[2]

The question whether a liquidator or liquidators represent the company only, or the creditors also, is one perhaps not quite settled conclusively. The former view received some countenance from two of the highest authorities[3] in English equity law, but the latter is the opinion of Mr. Justice Lindley,[4] which in the special subject is of great weight. It is thought, independently of authority, that it is the correct view, and that both in winding up by the Court and under supervision of the Court, until the creditors have been fully satisfied, the liquidator represents their interest, and for this reason that in both these modes of winding up the appointment of the liquidator restrains the separate action of creditors, which would be inequitable were their rights not fully protected by him. It is, however, a different question whether the liquidator can prevail against equitable pleas which would be good against the company itself. It may be contended that he could not, and that, like a trustee in bankruptcy,[5] he takes the estate of the company, including its claims against shareholders, subject to every equitable right which may be pleaded against the company.[6] Whether one of such equitable rights is that of a shareholder induced by fraud to purchase shares to reduce the contract, is at present *sub judice* in many cases, and under a variety of different

[1] L. p. 1243, and see certain exceptions, p. 1244 *et seq.*

[2] L. pp. 246, 1251.

[3] Lord Cairns in *Webb* v. *Whiffen*, L. R. 5 H. of L. 734; Lord Westbury in *Waterhouse* v. *Jamieson*, 24th May 1870, 8 M. (H. of L.) 88, reversing 13th March 1868, 6 M. 591.

[4] L. p. 1335, who founds on *Oakes* v. *Turquand*, L. R. 2 H. of L. 325.

[5] See Lord Westbury's opinion in *Fleeming* v. *Howden*, 16th July 1868, 1 L. R., etc., App. 382.

[6] On this ground the decision in *Waterhouse* v. *Jamieson*, 24th May 1870, 8 M. (H. of L.) 88, can be supported.

circumstances. It is beyond the scope of an article on procedure to anticipate their result.[1]

11. *Circumstances under which Court orders Winding up by itself.*—The circumstances which lead the Court to order a winding up by itself are too numerous for detail, and may be best understood by reference to the numerous English cases on this subject,[2] on which till recently there were few decisions in Scotland.

In the case of the City of Glasgow Bank, where the company closed its doors on 2nd October 1878, and by resolution at a special general meeting on 22nd October 1878, resolved to wind itself up voluntarily, and appointed four liquidators for that purpose, the Court, on a petition presented on 29th October by certain English creditors whose debts did not amount to more than a small fraction of the whole liabilities, refused to order a winding up by the Court, or to appoint an additional liquidator or creditors' representative.[3] But the voluntary liquidators consented to the alternative prayer of the petition, that the bank should be wound up under the supervision of the Court, and the Court so ordered.[4]

12. *Powers of Court after Petition to wind up is in dependence, exercised upon Motion.*—The dependence of a petition for winding up confers upon the Court certain powers which may be brought into exercise by motion of the party interested.

The Court may, before making an order for winding up on the application of the company, or of any creditor or contributory, restrain further proceedings in any action or proceeding against the company on such terms as it thinks fit (§ 85).[5]

The Court may appoint a provisional official liquidator (§ 85). It is in the discretion of the Court to require caution from the provisional liquidator, but it was not required where the manager of the company was appointed.[6]

The Court may grant leave to proceed with or commence an

[1] In *Western Bank* v. *Addie*, 20th May 1867, 2 L. R., etc., App. 145, and in *Oakes* v. *Turquand*, L. R. 2 H. of L. 325, it has been held that after a winding up has commenced a shareholder cannot rescind a voidable contract by which he purchased shares on the ground of fraudulent representations by the directors. These decisions have been followed and applied to a voluntary winding up in *Stone* v. *City and County Bank*, 27th Nov. 1877, 3 C. P. D. 312. But before the winding up has commenced he can do so on the same grounds (*Kisch* v. *Central Railway Co. of Venezuela*, L. R. 2 H. of L. 99; *Smith* v. *Rees River Co.*, L. R. 3 Eq. 122, aff. 3 Ch. 683). The principles given effect to in *National Exchange Co. of Glasgow* v. *Drew and Dick*, 9th March 1855, 2 Macq. 103, appear to establish that if there is in reality no contract, but only the simulation of one, it cannot be enforced by the company, or, it is thought, by its liquidator.

[2] See these cases stated by Lindley, p. 1239 *et seq.*, and the Analysis of Orders made on Petitions by Creditors and Contributories, p. 1252 *et seq.*

[3] See as to appointment of creditors' representative, L. p. 1274. This was done under 20 and 21 Vict. c. 78, but the assertions made on behalf of the English creditors, that a creditors' representative is now appointed under the Companies Act, 1862, in conjunction with liquidators, appear to have been based on misinformation.

[4] Petition, Brightwen *in City of Glasgow Bank Liquidation.*

[5] See also §§ 197 and 201, and *supra*, § 9. This was done in the cases of the *Benhar Coal Company*, Nov. 1878; *Caledonian Banking Company*, 6th Dec. 1878. See L. p. 1293.

[6] *Caledonian Banking Company, ut supra.* L. p. 1293.

action against the company, and impose conditions in the case of such leave being granted. Without leave of the Court no action can proceed against the company after a winding-up order (by or under the supervision of the Court) has been made (§§ 87, 198, and 202).[1]

13. *Powers of Court after Winding-up Order made, exercised upon Motion.*—After the winding-up order has been made the Court may, on the motion of any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to such winding up ought to be stayed, make an order staying the same either altogether or for a limited time, on such terms and subject to such conditions as it deems fit (§ 89). As a winding-up order is a judgment for the benefit of creditors as well as contributories, the winding up cannot be stayed without full notice to both, that they may oppose it if they think proper.[2]

The Court may direct meetings of the creditors or contributories of the company to be held for the purpose of ascertaining their wishes, and appoint a person to act as chairman to such meeting and report the result to the Court (§ 91).

The Court may appoint such person or persons either provisionally or otherwise as it thinks fit to the office of official liquidator or official liquidators, to conduct the proceedings in the winding up and assist the Court therein, and on making the appointment may determine whether any and what security is to be found by him (§ 92).

Where more than one official liquidator is appointed the Court declares whether any act required or authorized by the Act to be done by the official liquidator shall be done by all or any one or more of such persons (§ 92).

The Court may remove on due cause shown any official liquidator (§ 93).

The powers of the official liquidator are defined by § 95.

The Court may provide by any order that the official liquidator may exercise any of the powers conferred upon him by the Act without sanction or intervention of the Court, and where an official liquidator is provisionally appointed the Court may limit and restrict his powers by the order appointing him (§ 96).

These powers of the Court are usually brought into operation by simple motion in the petition in which the winding-up order has been made on behalf of the party interested. In complicated circumstances a petition may be expedient, but the expense of it would not be allowed if the Court deemed it unnecessary.

14. *Jurisdiction of Court of a quasi-criminal Nature exercised upon Motion or* ex proprio motu.—The Court has further certain extraordinary powers to exercise a jurisdiction of a quasi-criminal nature either upon motion or *ex proprio motu.* These statutory

[1] See *supra*, § 9.

[2] L. p. 1268.

powers are cumulative with and not in substitution for any other powers the Court may possess (§ 119).[1]

It may, after a winding-up order has been made, summon before it officers of the company, or persons known or suspected to have in their possession any of the estate or effects of the company, or supposed to be indebted to the company, or whom the Court may deem capable of giving information concerning the trade dealings, estate, or effects of the company.

If persons so summoned, and tendered a reasonable sum of expenses, refuse to come before the Court at the time appointed, and are not prevented by lawful impediment allowed by the Court, an order for their apprehension, for the purpose of examination, may be issued by the Court (§ 115).

The Court may examine upon oath either orally or by written interrogatories such persons, and reduce their answers to writing, and require them to subscribe the same (§ 117).[2]

It may order the arrest of any contributory,[3] and seizure of his books, papers, moneys, securities, and goods to be safely kept till the Court shall order otherwise, on proof of probable cause for believing that he is about to quit the United Kingdom, or abscond, or remove, or conceal any of his goods for the purpose of evading calls or avoiding examination (§ 118).[4]

15. *Petitions incidental to Order for Winding up.*—The most usual and important judicial proceedings in the course of a winding up by the Court are those relative to contributories, which are conducted by petition. Of these three deserve special notice:—

The petition to settle a list of contributories.

The petition to rectify the register or list of contributories.

The petition[5] for decree of payment of calls.

After a winding-up order has been made, all such petitions are presented to the Division of the Court before which the petition for winding up depends. Petitions presented prior to the winding-up order to the other Divisions of the Court are transferred to such Division.[6]

16. *Petitions to settle List of Contributories.*—Petitions to settle list of contributories are regulated by § 98, which provides, "As soon

[1] The mode of procedure under these clauses (115-119) in the Court of Session has not been settled. In England it is by summons (L. p. 1286), and it is thought that in Scotland in ordinary circumstances the applicant could proceed by motion of which due notice was given to the person against whom the order is sought, or perhaps in some cases on satisfying the Court that to give notice would defeat the purpose of the order, and that such order is in itself reasonable. Cases may, however, occur in which the more formal procedure by petition would be expedient, and until the Court has settled this matter by decision or Act of Sederunt, the practitioner must use his discretion in the matter of procedure, having regard to the nature of the order required.

[2] L. p. 1286 *et seq.*

[3] This may be done also in the case of an alleged contributory (§ 74).

[4] L. p. 1288.

[5] In England the form is by summons served four days before the day appointed for making the call (L. p. 1437).

[6] This, which is settled practice in England, was followed by the Second Division of the Court in the case of the *City of Glasgow Bank Liquidation*, December 1878.

as may be after making an order for winding up the company, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act."[1]

The petitioner is the official liquidator. Intimation on the Walls and in the Minute-Book and to the shareholders is ordered.[2] The petition, besides the leading prayer to settle a list of contributories, frequently adds prayers for the exercise of one or more of the powers conferred by the statute on the liquidator with or (if provided by any order of the Court) without the sanction of the Court.[3]

In a petition for settling a list of contributories in a winding up by the Court, founding on sections 95-102, 105, 107, and 109, the Court (1) settled a list; (2) made a call upon the contributories so settled; (3) made an order for payment of a debt due to the company, and for the delivery of a deposit receipt belonging to it; (4) fixed a day for the creditors to prove their claims (§ 107); (5) empowered the liquidator to advertise the day so fixed; (6) empowered the liquidator to raise all actions necessary for the realization of the company's property, (7) and to execute deeds and receipts or other documents necessary for the same purpose; (8) if necessary, to prove and rank claims, and draw dividends from the estates of bankrupt or insolvent contributories or debtors; (9) to take out letters of administration or obtain himself empowered as executor creditor of deceased contributories; and (10) appoint a law agent; but it refused in *hoc statu* power to distribute the company's estate amongst creditors whose debts had been proved, and to adjust disputed claims, and stated if such powers were required, a new petition should be presented setting forth the circumstances.[4]

In settling the list of contributories the Court may rectify the register of members (§ 98).

17. *Petitions for Rectification of Register or of List of Contributories.*—Whether the company is being wound up or not the Court has power to rectify the register of members under § 35, which provides: "If the name of any person is without sufficient cause entered in or omitted from the register of members of any company under this Act, or if default is made or unnecessary delay takes place in entering on the register the fact of any member having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may, . . . as respects companies registered in Scotland, by summary petition to the Court of Session, or in such other manner as the said Courts may direct, apply for an order of the Court that the

[1] See petition *Blair, Official Liquidator Southern Bank*, 17th July 1874, not reported. See also L. p. 171 *et seq.* This petition is only necessary in winding up by the Court. In winding up under the supervision of the Court, the liquidator may himself settle the list of contributories (§ 133 (8)), and thereafter proceed by petition to obtain decree for calls under § 121.

[2] *Collie* v. *Cruickshank*, 7th July 1865, 3 M. 1064.

[3] See §§ 95, 96, and 97.

[4] *Collie* v. *Cruickshank*, 7th July 1865, 3 M. 1064.

register may be rectified; and the Court may either refuse such application with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the petitioner may have sustained."[1]

On the construction of this clause it has been held in England, after some difference of opinion, according to the latest and best authority, that "the register may be rectified whenever it can be shown by any person that some other person ought, as between themselves, to be put in his place."[2] Such, at least, is the rule where the application for rectification of the register is made before winding up has commenced. After winding up has commenced, and the question is whether the list of contributories should be varied, it is more difficult to succeed in obtaining an alteration of the register or list; but apart from cases of fraudulent transfers, or transfers to men of straw to escape liability, where there has been a *bona fide* but incomplete transfer which the transferee could not repudiate in a question with the transferor it seems equitable that the former and not the latter should be held the true member, and placed upon the register and list of contributories.

In proceedings under § 35 the Court may decide any question that it may be necessary or expedient to decide for the rectification of the register. If necessary the Court may direct an issue in which any question of law may be tried (§ 35), but as this mode of trial is not imperative the Court of Session would in general order disputed facts to be ascertained by a trial before a judge, and it has adopted this course in the petitions to rectify the register and list of contributories in the liquidation of the City of Glasgow Bank. The provision for an issue is indeed expressed in language scarcely applicable to Scottish procedure, and primarily if not exclusively applicable only to English procedure prior to the union of law and equity under the Judicature Act. As the Court of Session has not directed any other manner of applying for an order for the rectification of the register, the procedure in such cases is by petition in common form for rectification of the register. Such petition commonly prays for the removal or deletion of a name from the register, but it may also pray for the addition, or separately, for the insertion of a name upon the register. It is proper to add a prayer for notice being sent to the registrar of joint-stock companies (§ 36).

After a list of contributories has been settled either by the Court

[1] See also § 98, L. p. 142, as to who are members; § 171, L. p. 1829-31 *et seq.*, as to who are contributories.

[2] L. p. 171. *Ex parte* Sharp, 2 Q. B. D. 463. Ward and Garfit's Case, 4 Eq. 189. Musgrave and Hart's Case, 5 Eq. 193. Turner, L.-J., in Ward and Henry's Case, 2 Ch. 431.

or by the liquidators in a voluntary winding up, or winding up under the supervision of the Court, it is proper that the petition should pray for an order upon the liquidators to delete the name from the list of contributories as well as for an order to rectify the register of members.[1] In some cases the petitioner does not maintain that his name should be deleted altogether, but only that it should be removed from the list of contributories in their own right to the list of contributories as representative of or liable for the debts of others, or it may be from the list of present members to the list of past members, whose liability is postponed. In such cases the prayer of the petition will be varied to suit the circumstances. The grounds upon which the register may be rectified, or names deleted from the list of contributories, do not fall within the subject of procedure.

It is within that subject and of much importance to observe that it is settled in English practice, that although after a list is once settled it can be varied only by leave of the Judge, no time is limited within which he cannot vary it.[2] He may even, according to that practice, revise and vary any decision previously made by himself,[3] and that without fresh evidence being adduced.[4] "But it need hardly be said," Mr. Lindley observes, "that this power is exercised with great caution; and only under special circumstances, and where there are good reasons for not having made the application sooner."[5]

18. *Petitions for Decree of Payment of Calls.*—Petitions for decree for payment of calls are competent when a company has been ordered to be wound up by the Court. The procedure for this is regulated generally by § 102, and specially as regards Scotland by § 121. The petitioner is the official liquidator.[6]

On production by the liquidator of a list certified by him of the contributories liable in payment of calls, and of the amount due by each contributory respectively, and of the date when it became due, the Court, by either Division in session, and the Lord Ordinary on the Bills in vacation, may "pronounce a decree against such contributories for payment of the sums so certified to be due, with interest from the said date till payment at the rate of five

[1] It is perhaps not necessary to pray for rectification of the register in such circumstances, but there appears no harm in doing so. In England the register has been rectified by the Court in proceedings as to settling the list of contributories without a special prayer, but where the winding up is voluntary, or under the supervision of the Court, it is thought it is proper to make an application containing a special prayer to that effect. See L. p. 1330.

[2] L. p. 1328.

[3] Hopkins' Executors' Case, 4 De J. G. and L. Sm. 342; *ex parte* Curzon, 3 Drew, 508.

[4] Crosfield's Case, 4 De J. and S. 338; 2 De J. M. and J. 128.

[5] See cases in which the list has been varied, L. p. 1329 *et seq.*

[6] It is no objection to decree being granted, that the liquidator has gone to reside in England (*Robertson*, 20th Oct. 1875, 3 R. 17). But the Court will not, unless in special circumstances, appoint a liquidator who is not subject to its jurisdiction (*City of Glasgow Bank, petition Brightwen*, 29th Oct. 1878).

per centum per annum, in the same way and to the same effect as if they had severally consented to registration for execution on a charge of six days of a legal obligation to pay such calls and interest. And such decree may be extracted immediately, and no suspension thereof shall be competent except on caution or consignation, unless with special leave of the Court or Lord Ordinary" (§ 121). The petition is presented to either Division, or in vacation to the Lord Ordinary on the Bills.

The proceedings to enforce calls by petition were held to be *ex parte* by the whole Court in a case under the Joint-Stock Companies Act, 1858, which contains similar provisions, and it was observed that no person in the list of contributories so settled would even be entitled to appear. Accordingly no notice or intimation of the petition was deemed requisite.[1] Whether this decision and the principles it gave effect to govern the case of winding up under the supervision of the Court—a question not free from difficulty—will be considered presently.

The summary mode of enforcing calls under § 121 is not applicable to calls made by directors prior to the winding up, but only to calls made by the liquidators in course of it.[2] Calls of the former kind must be enforced by ordinary action.

With regard to what would be a sufficient ground of suspension, it has been decided that an illiquid claim of damages against the company is not so,[3] although if undisputed, an illiquid debt may be given credit for by the liquidators. It was observed in this case that "the grounds of suspension contemplated by the statute seem to be either of the nature that the party is not a contributory, which would be a perfectly good objection, because the decree is necessarily one in absence, or some such reason as that the calls are not due, or that the liability has been extinguished."[4] But no opinion was expressed whether on such grounds of suspension caution or consignation would be necessary.

19. *Company can be wound up under Supervision of Court whenever a Resolution to wind up voluntarily.*—A company registered under the Act of 1862 or the prior Companies Acts, 1856, 1858, and Industrial and Provident Societies registered under 25 and 26 Vict. c. 87, and 39 and 40 Vict. c. 45,[5] may be wound up under the supervision of the Court whenever a resolution (special or extraordinary, according to circumstances) has been passed by the company to wind up voluntarily (§ 147). Such resolution is a necessary preliminary,[6] but the Court may allow a petition to stand over till such a resolution is passed.[7] The circumstances under which

[1] *Lumsden*, 14th Dec. 1858, 21 D. 110, under the Joint-Stock Companies Act of 1858, § 5, which applies to winding up compulsorily or in continuance of a winding-up order, and in other respects is expressed in identical terms with § 121 of the Act of 1862.
[2] *Mitchell*, 16th July 1863, 1 M. 1116.
[3] *Urie* v. *Lumsden*, 25th March 1859, 22 D. 38.
[4] Inglis, L. J.-C., opinion. [5] See L. p. 1460. [6] See L. p. 1471. [7] L. p. 1472.

a company may be wound up voluntarily[1] are—(1) Whenever the period (if any) fixed for the duration of the company by the articles of association expires, or whenever the event, if any occurs, upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily; (2) whenever the company has passed a special resolution[2] requiring the company to be wound up voluntarily; (3) whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same (§ 129).

20. *Procedure in Winding up under Supervision of Court.*—The application to wind up a company subject to the supervision of the Court is by petition.[3]

The petition may be presented either by creditors or contributories. Its prayer is that the voluntary winding up should cóntinue, but subject to the supervision of the Court, and with such liberty for creditors, contributories, or others to apply to the Court, and generally upon such terms and conditions as the Court may think just (§ 147). A prayer may be added for the appointment of an additional liquidator or liquidators.[4]

A petition to wind up under the supervision of the Court gives the Court the same jurisdiction over suits and actions as a petition to wind up by the Court (§ 140).

The petition is advertised and served in the same manner as a petition to wind up by the Court.[5] When presented, whether it prays wholly or in part that the voluntary winding up should continue subject to supervision, it gives the Court jurisdiction over suits and actions in the same manner as a petition for winding up by the Court (§ 149). In exercising its jurisdiction under this petition the Court may summon meetings for the purpose of ascertaining the wishes of creditors and contributories (ibid.). In making the order for winding up subject to supervision, or in any subsequent order, the Court may appoint additional liquidators or remove liquidators (§ 150),[6] or it may appoint the voluntary liquidators or any of them, either provisionally or permanently, and either with or without the addition of any other persons, to be official liquidators (§ 152).

[1] See L. p. 1460.

[2] A special resolution is defined by § 51, quoted *supra*, § 10.

[3] See an instance of such petition and procedure as to intimation and advertisement, *Christie*, 18th March 1876, 3 R. 623.

[4] In petition *Brightwen & Co.*, presented 29th October 1878, the prayer was alternative for winding up by Court and the appointment of official liquidators, or otherwise "to make an order for continuing the voluntary winding up of the said bank subject to the supervision of the Court, and to appoint" a certain person as additional liquidator, or in substitution for one of the voluntary liquidators.

[5] L. p. 1471.

[6] Liquidators can only be removed on due cause shown (L. p. 1474).

21. *Effect of Order to wind up under Supervision.*—The effect of an order to wind up subject to supervision is that "the liquidators appointed to conduct such winding up may, subject to any restrictions imposed by the Court, exercise all their powers without the sanction or intervention of the Court, in the same manner as if the company were being wound up voluntarily; but save as aforesaid, any order made by the Court for a winding up subject to the supervision of the Court shall for all purposes, including the staying of actions, suits, and other proceedings, be deemed to be an order of the Court for winding up the company by the Court, and shall confer full authority on the Court to make calls, or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court" (§ 151).[1]

Although § 151 gives the liquidators, except so far as restricted, all the powers which they would have had if only voluntary liquidators, it is safe and proper that they should apply to the Court for sanction to any measure of unusual importance, or which is opposed by either contributories or creditors.[2]

They require the sanction of the Court before making compromises (§ 160), and they require the sanction of a special resolution in order to sell assets of company to be wound up for shares, policies, or other like interests in another company (§ 161).

In practice, the incidental petitions to rectify the register and to give decree for payment of calls are brought before the Court in liquidations under supervision as well as in liquidations by the Court.

The result of the various provisions of the Act as to the position and powers of liquidators in winding up under the supervision of the Court—a subject with regard to which some doubts have been expressed—may, it is conceived, be stated as follows:—

After the order to wind up under supervision has been made the liquidators continue to have the whole powers of voluntary liquidators, except in so far as they have been restricted by the Court, and may exercise these without the sanction of the Court. But even on points as to which there has been no express restriction, it is expedient and prudent for them to apply to the Court for leave to exercise any extraordinary or unusual powers, and as regards the summary enforcement of calls and compromises of calls, debts, liabilities, and claims, it is necessary that they should apply to the Court for its sanction.[3] But in addition to the powers of voluntary liquidators, liquidators in winding up under the supervision of the Court may by application to the Court obtain all or any of the powers of official liquidators in

[1] L. p. 1473. [2] L. p. 1473.

[3] Accordingly the liquidators of the City of Glasgow Bank, which was being wound up under the supervision of the Court, applied for the sanction of the Court to the arrangement made by them with the directors of the Caledonian Bank, which was of the nature of a compromise, and the Court sanctioned that arrangement, Dec. 1878.

windings-up by the Court; for the Act gives "the Court power to make calls or to impose calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court; and in the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of the official liquidators, the expression official liquidators shall be deemed to mean the liquidators conducting the winding up subject to the supervision of the Court."

The question, therefore, above alluded to as one of some difficulty, whether, in a winding up under the supervision of the Court, the Court may exercise the power conferred upon it in winding up by the Court under § 121 of granting decrees for calls against contributories on a charge of six days, of which suspension shall only be competent on caution or consignation, unless with special leave of the Court or Lord Ordinary, must, it is thought, be answered in the affirmative.[1] But inasmuch as the list of contributories in a winding up under supervision is settled, not by the Court, but by the liquidators, a person so settled on the list, where the question of his liability is disputed and not decided by the Court, may more easily satisfy the Court or the Lord Ordinary that special leave to suspend without caution or consignation should be granted.

If, however, ample time has been allowed to contributories on the list to have their names taken off by petition, and the question whether this should be done has not been raised by neglect in presenting a petition, or, where a petition has been presented, and has been decided adversely, it is thought suspension without caution or consignation would not be allowed. Where the liability of the contributory had been settled by the Court, the Court in the City of Glasgow Bank liquidation refused to stay proceedings to enforce calls pending appeal to the House of Lords. But a general order was pronounced in the liquidation by which the liquidators were to be bound to repay calls in the event of the contributory being removed from the list by the House of Lords on appeal or otherwise.

The dependence of an action to set aside an entry on the register, or the acceptance of shares on the ground of fraud or otherwise, would, it is thought, not be deemed sufficient to allow suspension without caution or consignation.[2] Certainly no prudent contributory or alleged contributory who desires to avoid the necessity of consigning calls for which he disputes his liability should neglect or delay presenting a petition to rectify the register and remove his name from the list.

22. *Petitions to enforce in Scotland Orders of English Courts in Liquidation, or Orders of Scottish Courts in England or Ireland.*—

[1] This view is assumed in the case of *Mitchell* (1 M. 1116), where § 121 of the Act is expressly stated to be applicable to calls under voluntary as well as judicial liquidation, but the only point decided was that it was not applicable to calls made prior to liquidation.

[2] See *Urie* v. *Lumsden*, 22 D. 88.

All orders made by the Court of Liquidation in England shall be enforced in the same manner as if the order had been made by the Court of Session (§ 122).

Petitions are accordingly frequently presented to enforce the orders of the English Courts[1] or arbitrators appointed by Acts giving similar powers to those possessed by the Court with regard to payment of calls.[2] An office copy is sufficient evidence of an order by the English Court (§ 123).

The Sheriffs in Scotland, the Commissioners of the Court of Bankruptcy and the Judges of the County Courts in England who sit at places more than twenty miles from the General Post Office, and the Commissioners of Bankrupt and the Assistant Barristers and Recorders in Ireland, are Commissioners for taking evidence under the Act, and the Court may refer the whole or any part of the examination of witnesses to such Commissioners (§ 126).

In like manner all orders made by the Court of Session as the Court of Liquidation in Scotland may be enforced by the appropriate Court in England or Ireland (§ 122).

23. *Appeals to House of Lords in Winding up Cases.*—An appeal to the House of Lords[3] against a winding-up order, or against any order or decision in the course of winding up, is competent under the same conditions as appeals in other cases, but there is a special provision that notice of such appeal must be given within three weeks of the date of the order complained of, and in the same way as notice of appeal in other cases, failing which the appeal will not be heard.[4]

An appeal does not necessarily stay the proceedings in the Court of first instance,[5] and if it is desired that they should be stayed an application must be made to that Court, and will only be granted on cause shown.[6]

The question whether an appeal is in a particular case competent with or without leave depends on the rules of the Court of Session practice with regard to appeals in other cases.

[1] *Universal Mercantile Association*, 28th Jan. 1870, not reported; *Roswarne Mining Co.*, 25th Nov. 1873, not reported. See *Moyes* v. *Whinney*, 6th Dec. 1864, 3 M. 183.

[2] *Roswarne Mining Co.*, 11th July 1873, not reported; *European Insurance Co.*, 17th July 1873, not reported.

[3] Some doubt has been expressed whether § 124 applies to appeals to the House of Lords, but as these are the only appeals which can be taken from the Court of Session, and the section applies to "any Court having jurisdiction under the Act," it is thought its provisions must include such appeals, although it is open to argument, as part of this section refers to rehearings, a procedure peculiar to the English Court, that the section does not apply to Scotland.

[4] § 124, L. p. 1266. Before the Judicature Acts in England the limit of twenty-one days did not apply to appeals from winding-up orders (L. p. 1266, *g*); but it is thought, as there are no other provisions with reference to appeals from the Court of Session than those in § 124, that section must be held to apply to appeals from it to the House of Lords, and that notice of appeal within twenty-one days is required.

[5] L. pp. 1266, 1267.

[6] L. p. 1267.

REVISION OF STATUTE LAW.

WE refer our readers to articles which appeared on this subject in our volumes for 1864 (page 484) and 1876 (page 39). In these articles we noticed the curious fact of statutes of long past ages being for the first time repealed by the revision statutes, thereby assuming that they had been in observance until the date of their repeal. We gave instances of many *temporary* Acts passed for a *certain* period of years in the fourteenth and fifteenth centuries—even the series of Mutiny Acts from their commencement, though of their very character *annual* Acts,—were thought necessary, years after they of necessity had ceased to exist, to be formally repealed. Still more marvellous was it to learn of the repeal of statutes enacting that "no shoemaker shall be a tanner nor any tanner a shoemaker," that "Irishmen and Irish clerks mendicant shall depart the realm," that "the six clerks of the Chancery may marry," and "to prohibit salesmen to sell fat cattle." In our article in 1876 we pointed out a serious blunder perpetrated by the Revision Commission. By the Act 1873 there was repealed a section in a Scottish Act, the repeal of which was by the Act 1875 repealed and the section restored to its integrity. We are about to notice a still more grievous error which must require immediate attention. These revision statutes require no previous publication. All new legislation suffers several stages of incubation in both Houses of Parliament. The public are made fully aware of new, or amendments of old, statutes. But the work of the Revision Commission is unknown until it is completed, and the work of destruction is fully performed. There were no revision statutes in 1876 and 1877. Instead of these statutes there was appended to the official Statute-Book of 1876 and 1878 two "tables showing the effect of the year's legislation: Table A, Acts of the year (in order of chapter), showing their effect on former Acts; Table B, Acts of former sessions (in chronological order) repealed and amended by the Acts of the year." These appear to be very useful tables, if they be perfectly accurate. But it is strange to notice that they are appended to the Statute-Book without any sanction or authority whatever, farther than they are "printed by George Edward Eyre and William Spottiswoode, printers to the Queen's Most Excellent Majesty."

The Revision Commissioners have given in the last session of Parliament another statute limited to Irish legislation (41 and 42 Vict. c. 57). We notice that as they dealt with English statutes so have they with those of the sister isle. They commence their destructive career with the reign of Edward II. The present generation of Irishmen will be surprised to learn that until the year 1878 they were living under such laws as allowed "the king's officers to travel *by sea* from one place to another within *the land* [of Ir]eland"! or "that the sons of labourers and travailers of the

ground, as ploughmen and such other, shall use the same labours and travails as their *fathers and parents* have done," or "that the Irishmen dwelling in the counties of Dublin, etc., shall go apparelled like Englishmen, and wear their beards after the English manner, swear allegiance and take English surnames," or "An Act against the authority of the Bishop of Rome," or to restrain the carrying of hawkes out of this kingdom," or "An Act for banishing all Papists exercising any ecclesiastical jurisdiction, and all Regulars of the Popish clergy, out of this kingdom," or "An Act for the better suppressing Tories, Robbers, and Rapparees, and for preventing robberies, burglaries, and other heinous crimes"! Other statutes equally disconform to all modern customs have been now as for the first time repealed by the Act 1878. Another statute of the same year (41 and 42 Vict. c. 79) deals with British statutes. A few Acts which had apparently escaped the notice of the Commissioners in former revision statutes are now repealed, but the chief part of the schedule to this statute is devoted to the present reign, and carries on the work of repeal to the thirty-second year of her Majesty's reign. Once more the Commissioners have been obliged to add a second schedule, containing no fewer than five statutes either wholly or partially repealed in error, in the revision statutes of 1873 and 1875, and now restored to vitality "from the respective dates of the repeals thereof; and all proceedings taken under the said enactments respectively after the dates of the repeals thereof shall be as valid and effectual as if the said enactments respectively had not been repealed"!! Assuredly this is a strange mode of legislative wisdom. It testifies that the lieges were better acquainted with statutory law than the Commissioners, and so conformed to the law notwithstanding its erroneous repeal.

We now direct immediate attention to another serious mistake in this haphazard mode of legislation. In the year 1820, when serious troubles and riotous proceedings prevailed throughout the United Kingdom, an Act was passed (1 Geo. IV. c. 37), entitled "An Act to increase the power of Magistrates in the appointment of Special Constables." The preamble set forth that "whereas doubts have arisen whether any person can be compelled to act as special constable except in some actual tumult, riot, or felony, and whereas it is expedient that Justices of the Peace should have the power of compelling certain persons to act as special constables, not only in case of actual tumult, riot, or felony, but also on the reasonable apprehension thereof for the prevention of the same." The Act is short, but very comprehensive and effective for the important purpose designed. It is a public British statute, and was frequently enforced alike in Scotland as in England. By an Act passed in 1831 (1 and 2 Will. IV. c. 41), "for amending the laws relative to the appointment of special constables, and for the preservation of the peace," the Act of 1820 is so far repealed, but its provisions are repeated and greatly extended, and it forms a complete code for regulating the office of special constable in Eng-

land, to which it is in express terms confined. The repeal of the Act of 1820 is expressly limited "*as to all parts of England and Wales.*" The Act of 1831 is expressly declared "*not to extend to Scotland or Ireland.*" The Revision Commission, therefore, had no warrant whatever when, in the Act 24 and 25 Vict. c. 101 (1861), they obtained the repeal of "*the whole*" of the statute of 1 Geo. IV. c. 37. The effect of this unfortunate repeal was to leave Scotland without the aid of calling on the community in case of emergency to preserve the peace. Not content with the consolidated Act of 1831, England, notwithstanding its police statutes, obtained in 1872 an Act for the appointment of *parish constables* (35 and 36 Vict. c. 92), but which again leaves Scotland out in the cold. It is trusted that the law officers of the Crown will see that the English Acts of 1831 and 1872, so far as they can be made applicable to Scotland, should be immediately introduced as a separate Act. It is of great importance that lawyers should carefully revise their statutes at large with the aid of the revision statutes, and mark the Acts wholly or partially repealed. Without such safeguards it may be very dangerous to act on any statute not of very recent date.

H. B.

NOTES IN THE INNER HOUSE.

Macintosh Brothers v. *Wilson* (July 19, First Division) raises a novel point. In a case before the Petty Sessions of Edinburgh the evidence had been taken in shorthand. An appeal was taken to Quarter Sessions. By 7 and 8 Geo. IV. c. 53, s. 84, it is provided in such cases that the Court of appeal shall rehear upon oath and re-examine the same witness and witnesses, and reconsider the same evidence. Quarter Sessions, however, taking advantage of the existence of the shorthand notes, only put the witnesses upon oath and heard the evidence already taken read over and acknowledged. The appeal was dismissed, but a case granted for the Court of Exchequer. The Judges were unanimously of opinion that Quarter Sessions had done wrong in not re-examining the witnesses, as there had been in this respect a failure to comply with the provisions of the statute. The decision is valuable as serving to show how strictly regulations for the administration of justice in the inferior Courts will be construed. Here there had certainly been something very like a compliance with the spirit of the statute, which would seem to point at the Justices on appeal being placed in the same position as regards the evidence as that occupied by those who had sat in Petty Sessions. In the ordinary case this is not possible, as witnesses will hardly say exactly the same thing as they have said before. Here, owing to a record having been preserved, it was possible. The appeal Court had the evidence placed before it pre-isely as it had been before Petty Sessions, they heard the witnesses ere to that evidence, and the parties had an opportunity of

asking additional questions. Still the witnesses were not *re-examined*, and therefore the proceedings were vitiated.

In *Stott* v. *Fender and Crombie* (October 17, Second Division) there were two defenders with really one defence. The Court allowed only watching expenses to the second defender, disallowing the rest of his account, but finding that the part disallowed was to be borne rateably by both.

The case of *Webster* v. *Shiress* (October 26, Second Division) involved the question, to quote Lord Ormidale, "whether a father, although he has no available interest in or claim on the intestate succession of his daughter except that conferred upon him by the statute 18 Vict. cap. 23, has right to the office of executor of that daughter as one of her next of kin, notwithstanding the existence of brothers of the daughter, who are undoubtedly entitled to participate in her movable succession as her next of kin." It was an appeal from the Sheriff Court of Perthshire. In that Court a father had been decerned executor dative *qua* next of kin to his daughter, but had shortly afterwards died before confirmation. His executor being decerned in his place, a brother of the deceased lady then applied to the Sheriff to have this decree set aside on the ground that her father not being one of the next of kin was not entitled to the office. A question of procedure hence arose, Was it competent to recall a decree of this sort already pronounced? The Sheriff-Substitute, and afterwards the Sheriff, first decided that the recall was competent, being the form most consistent with Commissary Court practice, and they afterwards did recall their former decree in favour of the father's executor. Sheriff Barclay's view was that while the Act of 1855 gave the father one-half of the movable succession of an intestate child, this was merely a claim of debt, and that although, failing collaterals, parents might claim the office of executor, it must be as such and not as next of kin. Both of the Sheriffs seemed to have quite overlooked the possibility and expediency of conjoining the two claimants for the office. But that was the course which the Court of Session at once adopted as the proper one in the circumstance. The Lord Justice-Clerk had no difficulty in coming to the conclusion, that "as the father succeeded to half the movable estate, he has half the interest in the succession, and according to the universal rule in intestate movable succession, is entitled to a share of the administration," and that there can be no relation of debtor and creditor between the father and the collateral in this matter. His Lordship further held that the term "next of kin" does not denote any special degree of propinquity, that the father was always one of the kin, and only brought a degree nearer in point of relationship as regards succession by the Succession Act. Contrasting the case with that of Muir (4 Ret. 74), which related to a mother's claim as next of kin, he held that the opinion then expressed by the Lord President, being founded on the radical distinction between the case of the mother and the case of those who are by law akin to her children, was

not opposed to the view now expressed by himself. The case of Muir "fixed nothing but a point of designation or nomenclature." Upon this point Lord Ormidale held a different view, and refused to recognise any distinction between the case of a father and that of a mother, but concurred in the propriety of conjoining the applicants for the office. Lord Gifford's explanation of the term "next of kin" in a case of succession was that it meant those who take next.

In *Hardie* v. *Leith* (October 31, Second Division) we have a decision important to Sheriff Court practitioners. The mother of an illegitimate child born in 1865 obtained a decree for aliment against its father until it should be ten years old or able to maintain itself. In 1878 she brought a second action, seeking aliment from 1875 to 1880. The Court held her entitled to past aliment, but rejected her claim for future aliment, as she was not entitled to sue in the name of a *minor pubes* who was *sui juris*.

The case of the *Lord Advocate* v. *Sharp* (October 31, Second Division) raises a point which if not of any general interest, is at least novel. It decides that the proprietor of salmon fishings in the sea is entitled to access to them through the lands *ex adverso* of which they lie, and to the right to use the foreshore, beach, and waste-lands adjoining for purposes connected with his fishings. It was admitted that the right of fishing might be exercised without encroaching upon the defender's ground, but that it could not be so exercised profitably. The Court applied the same principle to fishings in the sea which has been recognised in the case of rivers, and recognised the right to use the shore as an accessory to the right of fishing itself. The Lord Justice-Clerk concurred in this judgment reluctantly, as he thought its effect would be to lay a new and anomalous burden on land without any corresponding equivalent, and he also considered that the practice of using stake nets in the sea was contrary to the spirit of the Salmon Fishing Acts.

In the case of *Mason Brothers and Company* v. *Rennie* (November 8, First Division) an attempt was made to establish that by a trade custom when the "best glazing quality" of glass was contracted for, ordinary glazing quality was always supplied. The Court held that even although such a practice had been proved, it could not have been recognised in respect of its dishonesty.

In the special case *Dunsmure's Executors* (November 9, Second Division) we find one of those puzzling questions to which the habits of testators sometimes give rise. A lady by her will directed her executors to give effect to any expression of her intention which they might find, although contained in informal writings, if holograph and signed by her. Shortly before her death she sent to her agent a document dated March 1878, in which she directed a certain number of legacies to be paid to certain individuals named in it. After her death a similar document was found in her repositories dated February in the same year. This earlier list of legatees contained all the names subsequently inserted in the later [illegible]ing with similar sums as legacies, but in addition one name and

legacy which was not repeated. The residuary legatee maintained that the February writing must be held to be a draft of that in March, which alone could be taken into account. On the other hand it was contended that both documents must be given effect to, that the legacies were cumulative, and that the legacy fell to be paid to the legatee who was mentioned only in the February document. The Court held that the earlier writing was superseded by that of later date with respect to all that was contained in it, so that the legacies were not cumulative. But they also held that the legacy which was contained in the former alone was not to be treated as cancelled and struck out in respect of its omission from the subsequent writing, but must be given effect to.

Reviews.

Select Cases decided in the Sheriff Courts of Scotland. Collected by WILLIAM GUTHRIE, Advocate, Sheriff-Substitute of Lanarkshire. Edinburgh: T. & T. Clark.

THE publication of *select* decisions is not a novelty in the legal literature of Scotland. But hitherto they have always been the decisions of Supreme Courts. The experiment now made by Mr. Guthrie may be justified on several grounds. It is true, as he remarks in the preface to the present work, that "by far the greater part of the judicial business of Scotland is done in the Sheriff Courts," if at least the amount is to be estimated by the number of cases. Further, although it is difficult to conceive points arising in the inferior Courts which never can be decided in the Court of Session, still it is the case that many points have been raised in these Courts upon which there is not, and may not be for long, any authoritative ruling. Some of these points are presented to us in this volume. It will be seen by a glance at the index that the decisions relate mainly to matters daily brought before the Sheriff Courts, such as aliment, arrestments, cessios, hypothec, and questions of procedure. They are of no binding authority as judgments, and they are not entirely consistent, but they have value as the opinions of lawyers of more or less learning and experience, and we see no reason why they should not come to be quoted even in the Supreme Court, if more to the point than anything contained in Shaw & Dunlop.

Of course the merit of such a work as the present depends greatly upon the sense and judgment of the editor. The name of Mr. Guthrie is a sufficient guarantee for the careful preparation of this collection. He is already very favourably known for his editions of important legal treatises, while perhaps no Sheriff-Substitute has in so short a time earned for himself a higher judicial reputation.

One is surprised at some of the points raised in this volume

being still undecided by the Supreme Court. To take an example. It appears to be still uncertain whether or not interest upon a merchant's account prior to the date of citation can be recovered in a court of law. In Aberdeenshire, in spite of a decision to the contrary by the Sheriff Principal, both the Sheriff-Substitutes have decided in favour of interest, while Sheriff Lees of Glasgow has held that it is not due either from the date of the last item in the account or from that of rendering it. So that if a creditor sues in Aberdeen he gets interest, but if in Glasgow he must be contented with the principal sums alone. It is to be hoped that ere long the Court of Session may give forth a more certain sound upon the point than it has hitherto favoured us with. We note among the more important matters decided the following: Sheriff Fraser has held in *Stewart* v. *Jarvie* (222) that the principle of reconvention applies to counties as well as countries. Several Sheriffs have exempted the minister of a parish from the payment of school rates. Sheriff Gloag has decided against the competency of appealing a Sheriff-Substitute's interlocutor refusing interim liberation in a *cessio bonorum!* Surely Sheriff Barclay can have had no difficulty in holding that an offer of marriage is no defence to an action of aliment for an illegitimate child. Sheriff Comrie Thomson must have lost the esteem of all elderly spinsters by having in *M'Kay* v. *Kidd* (503) refused to extend legal privileges to cats.

If he meets with encouragement, the learned editor indicates that he is willing to continue this series, and he invites help and suggestions. We trust his invitation may be responded to favourably, and that in the meantime the present volume may have the wide circulation amongst Sheriffs and Sheriff Court practitioners which it unquestionably deserves.

Procedure in the Court of Session. By JOHN P. COLDSTREAM, W.S. and Depute-Clerk of Session. Edinburgh: T. & T. Clark.

THIS is not a philosophical but a practical treatise on a subject which interests the professional lawyer, and Mr. Coldstream's position has enabled him to produce a book of value to the practitioner. It is written as a concise treatise on the subject, and our only regret is that it is too concise. It in fact partakes more of the character of notes for lectures. It seems to afford, however, the necessary information in all ordinary actions. But there is no notice of the important (although uncommon) procedure in an undefended action in which the pursuer (as is his right) leads proof so as to obtain a judgment *causa cognita.* Again, although the ordinary pursuer of an action of maills and duties may be embraced in the curt announcement that it is "competent to a proprietor or to one claiming in right of a conveyance," it would be far more useful, especially for the student, if liferenters by constitution and heritable creditors had been announced as the parties who most usually resort to this action. We confess to never

having been previously acquainted with "a box-week in vacation." A week of boxing days would be a novelty, and we therefore prefer to suppose that the week in which the boxing day in vacation occurs is what Mr. Coldstream designates by the novel term. The compression which has resulted in confining Mr. Coldstream's notes to 183 pages enables the publishers to give within a reasonable compass what we venture to think is as valuable a part of the volume, consisting as it does of 179 pages devoted to the Acts of Parliament and Sederunt relating to procedure in the Court of Session. The profession will be grateful to have them thus collected.

The Month.

Act of Sederunt regulating the Fees of Agents practising before the Sheriff Courts in Scotland.—The Lords of Council and Session have issued the following Act of Sederunt as to fees in Sheriff Courts, repealing the Act of Sederunt of 1st March 1861:—

GENERAL REGULATIONS.

I. In the Ordinary Sheriff Court there shall be two scales of taxation, viz. *first*, for causes where the amount of principal and past interest concluded for does not exceed £25; *second*, for causes of higher amount. In executry proceedings there shall be one scale of taxation only.

II. Where the demand does not exceed the sum which may be competently concluded for in the Sheriff's Small-Debt Court, no fees shall be allowed except those authorized by the Act 1st Vict. c. 41, unless the Sheriff see cause to the contrary; but when a case is removed from the Small-Debt or Debts Recovery Court to the Ordinary Court, it shall be competent to the Sheriff to allow the business to be charged for according to the subjoined tables.

III. (1) The scale for taxation shall in the ordinary case be determined by the amount concluded for, but in all cases it shall be competent to the Sheriff to direct that the expenses shall be taxed according to the scale applicable to the amount decerned for. (2) In cases where the sum concluded for does not exceed £25, it shall be competent to the Sheriff to direct taxation on the higher scale, if he shall be of opinion that the amount sued for does not truly indicate the nature and importance of the cause. (3) In damages cases, the scale for taxation of the account between party and party shall for the pursuer's agent be regulated by the sum decerned for, unless the Sheriff shall otherwise direct. (4) It shall also be competent to the Sheriff to disallow all charges for papers or parts of papers or particular procedure or agency which he shall judge irregular or unnecessary.

These regulations shall not affect the ordinary power of the Sheriff to declare that expenses shall be subject to modification.

IV. Procedure in ordinary removings and ejections shall be charged by the amount of the rent. When the rent is not set forth as exceeding £25, the charges shall be according to Scale I. In actions *ad factum præstandum*, for exoneration, interdict, and others, where the pecuniary amount or value of the question in dispute cannot be ascertained from the process, the Sheriff, when deciding the case, shall determine according to which scale the account shall be taxed.

V. In causes of great importance, or requiring much special preparation, it shall be in the discretion of the Sheriff to allow for a debate on the merits a higher fee than those allowed in the table, but not exceeding £5; and that

either by a direction in the interlocutor disposing of the merits of the cause, or by a special interlocutor following on a motion by the party found entitled to expenses.

VI. This table of fees shall regulate the taxation of accounts, as well between agent and client as between party and party, but with this distinction, that where, as between party and party, general charges of limited amount, such as "taking instructions" at the commencement of a case, "instructions for precognition," and "process fee," only are allowed, it shall be in the option of the agent, as against the client, to substitute for these general fees detailed charges for all necessary business in connection with the case, the rates of charge being regulated by this table.

VII. The expenses to be charged against an opposite party shall be limited to proper "expenses of process," without any allowance (beyond that indicated in the table) for preliminary investigations, subject to this proviso, that precognitions (so far as relevant and necessary for proof of the matters in the record between the parties), although taken before the raising of an action or the preparation of defences, and although the case may not proceed to trial or proof, may be allowed where eventually an interlocutor shall be pronounced allowing a proof.

VIII. In order that the expenses of litigation may be kept within proper and reasonable limits, only such expenses shall be allowed, in taxing accounts between party and party, as are absolutely necessary for conducting it in a proper manner, with due regard to economy.

IX. Notwithstanding that a party shall be found entitled to expenses generally, yet if, on the taxation of the account, it shall appear that there is any particular part of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts of the proceedings.

X. Whenever a procurator on one side attends any meeting ordered by the Sheriff for adjusting the record, or for any other purpose, and the other is absent, or not prepared to proceed, the Sheriff shall have power to decern against the opposite party for payment of the fee for attendance to the procurator who is ready. And when no notice has been sent of the withdrawal of an appeal, at least two lawful days before the date fixed by the Sheriff for an oral hearing, two-thirds of the fee for the debate will be allowed to the respondent's agent.

XI. The principal interlocutor sheets shall not be given out to parties; a certified copy thereof shall be made up by the Clerk from time to time, and put in process, for which he shall be allowed to make a charge at the end of the process for the total number of sheets contained therein, according to Art. 3 of the table, to be paid by the party found liable in expenses, or, where no expenses are found due, by the parties equally.

XII. When a remit shall be made by the Court, regarding matters in the record between the parties, to an accountant, engineer, or other reporter, the agents shall not, without special agreement, be personally responsible to the reporter for his remuneration,—the parties alone being liable.

XIII. Agents acting for parties on the poor's roll shall not be liable for the charges or allowances to witnesses, Sheriff-clerks, shorthand writers, Sheriff-officers, or bar-officers. JOHN INGLIS, *I.P.D.*

Tables of Fees.

I.—General Business in Sheriff Courts.

1. Taking Instructions to conduct case of pursuers, or defenders, including charge for entering or inquiring for appearance, interlocutor sheets, and inventory of process, and attending to all the necessary steps of form previous to first enrolment, 5s.[1] and 10s.[2]

2. Drawing Papers per sheet (the sheet throughout this table consisting

[1] Scale I., not exceeding £25. [2] Scale II., above £25.

of 250 words)—(1) Petitions, condescendences, defences, and answers, commissions and diligences against witnesses or havers, memorials and precognitions, reclaiming petitions and answers, affidavits, and generally all necessary papers, 4s. and 6s. Fair copies of commissions and diligences against witnesses or havers not allowed, and duplicates to be charged as copies. (2) Inventories of productions, 2s. and 3s. Papers shall be confined, as closely as the case will permit, to statements of facts, and argument without quotations; but reference shall, where necessary, be made to the record and to authorities cited, as well as to proofs, deeds, writings, or correspondence produced, without the same being quoted at length; and if, in any paper produced in a cause, quotations of any kind exceeding one page each in length shall be made, the same shall be chargeable only at the rate of copying instead of drawing fees. (3) Figured States—Ordinary size, 6s. and 8s.; folio, 8s. and 10s. (4) Revising Papers—One-half the drawing fees.

3. Copying Papers per sheet—(1) If in English, 1s. and 1s. 6d. (2) If in any other language, 1s. 6d. and 2s. (3) Figured States—Ordinary, 1s. 6d. and 2s.; folio, 3s. and 4s. No allowance shall be made for a copy of any papers or productions in a process, except such as may be absolutely necessary. But each agent shall be entitled to a full copy of the record, interlocutors, and proof, and any productions that may be necessary for the efficient conduct of the cause.

4. Instructing Counsel, where the employment of counsel is authorized, or subsequently sanctioned—Letter or attendance with fee, £1, 1s. or £2, 2s., 6s. 8d. and 6s. 8d.; exceeding £2, 2s., and not exceeding £5, 5s., 10s.; exceeding £5, 5s., 13s. 4d.

5. Revising Papers drawn by Counsel, where the employment of counsel is authorized, or subsequently sanctioned—Not exceeding 5 sheets, 2s. 6d. and 3s. 4d.; exceeding 5 sheets, and not exceeding 10 sheets, 5s. and 6s. 8d. And for every additional 10 sheets or part of 10 sheets, 2s. 6d. and 3s. 4d. The revisal of papers drawn by counsel to be charged according to their length as finally lodged.

6. Attendances, etc.—(1) Each necessary attendance, including journeys, attending at a debate when counsel instructed, or at a jury trial or proof, or an examination of parties or havers, or visitation or inspection ordered by the Court; or on an accountant, surveyor, engineer, architect, tradesman, or other person to whom a remit shall be made by the Court, or at an audit, or making searches of any of the public records, or other like attendances, where the same shall be necessary. (*a*) If at the Court or in the town or place where the agent practises, or its neighbourhood, not exceeding half an hour, 3s. 4d. and 5s.; exceeding half an hour, but not exceeding an hour, 5s. and 6s. 8d. And for each half-hour thereafter, 2s. 6d. and 3s. 4d. (*b*) If at a distance therefrom, for the time occupied in such business (including travelling), at the rate per day of £2 and £3. Besides reasonable travelling charges, and an allowance for maintenance, at a rate not exceeding per day £1 and £1. (*c*) If, during such absence, the time necessarily occupied in actual business during any day shall exceed eight hours, the agent shall have allowance for such additional time, at the rate for each hour of 5s. and 6s. 8d. (*d*) But when business may be properly performed by a local agent, the Auditor shall only allow such expenses as would have been incurred if it had been done by the nearest local agent, including reasonable charges for instructing him. (2) Allowance to agent for time of clerk necessarily occupied—(*a*) If in the town or place where the agent practises, or its neighbourhood, per hour, 2s. 6d. and 3s. 4d. (*b*) At a distance, per day, 10s. and £1. And, in addition, reasonable travelling charges and personal expenses, the latter not exceeding per day 10s. and 10s. (3) Attendance lodging application, and procuring deliverance on any application where a special warrant other than a warrant of service is procured, *ex. gr.* interim interdict, sequestration, 3s. 4d. and 6s. 8d. (4) Borrowing a process consisting of not more than forty numbers, 1s. and 1s. 6d.; above forty and not exceeding a hundred numbers, 2s. and 3s.; above a hundred, 3s. and 4s. But

if only a part of the process is required, *ex. gr.* an interest in a process of multiplepoinding, the charge to be according to the number of articles requiring to be borrowed. (5) Returning a process and getting receipt scored, one-half of the above borrowing fees. (6) Ordering a caption for the return of a process, and intimating same to opposite agent, 1s. 6d. and 2s. 6d. (7) If the process is not returned after intimation by the clerk, procuring caption, and instructing officer to execute, 1s. 6d. and 2s. 6d. When the caption is enforced, the above fees to be paid by the party against whom it is directed, with the clerk's and officer's fees, the several fees to be paid being printed or marked on the back of the caption. (8) Inquiries if paper of opposite party lodged, 1s. 6d. and 2s. 6d. But this to be charged only once as to each paper. (9) Lodging each paper, and productions made therewith, 1s. 6d. and 2s. 6d. Or if productions necessarily lodged separately from paper, the same fee. (10) Ordering and procuring from clerk any deliverance, act or warrant, commission, diligence or extract decree, or authentication of an interlocutor or order of Court, where such is necessary, 2s. and 3s. 4d. (11) Instructing messenger or officer to serve, execute, or intimate the various kinds of writs, when necessary—For the first party on whom service or intimation is made, 2s. and 3s. 4d.; for every other, 6d. and 6d. This charge to include examination of executions. (12) Attendance on reporter with proceedings, etc., and getting him to accept remit, 2s. and 3s. 4d. (13) Attendance on reporter, getting up his report, and settling his fee, 2s. and 3s. 4d. (14) Attendance on a commissioner, fixing diet of proof or examination of parties or havers, and intimating the same to the opposite agent or party, and writing certificate of intimation, 3s. and 5s. (15) Attendance on commissioner under commission and diligence, and getting up his report, with productions, etc., and paying his fee, 3s. and 5s. (16) Perusing and considering reports obtained under a remit, 3s. 4d. and 5s. (17) Taking out bond of caution, getting it signed, returning the same when executed to the clerk, and intimating the lodgment to the opposite agent, 3s. 4d. and 6s. 8d. (18) Procuring bond attested when necessary, 2s. and 3s. 4d. (19) Inspecting books to ascertain if caution has been found, and consenting or objecting thereto, 3s. 4d. and 6s. 8d. (20) Enrolling a cause and intimating enrolment to opposite agents—Where only one agent, 1s. and 2s. 6d.; for each other, 6d. and 6d. (21) Attendance at calling in Motion or Compearance Roll, or at diets for adjustment, or when the case is ordered to the roll for any purpose other than a debate, 3s. 4d. and 5s. But there shall be no charge for attendance when the cause is not called, or where the calling proves abortive. (22) Attendance and inquiries as to a cause at avizandum, 2s. and 3s. 4d. This to be only once stated for each time at avizandum. (23) Taking protestation for not calling, enrolling, or insisting in the action, 2s. and 3s. 4d. (24) The papers which form the record being lodged on both sides—For the agent's trouble in going through the whole proceedings and productions, preparatory to and attendance at closing the record, 6s. 8d. and 13s. 4d. (25) Debate fee—When a debate has been ordered by the Sheriff, or the case appears in the Debate Roll in ordinary course, or at the conclusion of a proof, including preparation for debate, £1, and from £1, 10s. to £3. No other charge shall be made for attendances in respect of case being in the Debate Roll, however long the debate may have continued, or however often the case may have been called for such debate or been in the roll without being called. (26) Attendance inquiring for or obtaining decree in absence, 3s. 4d. and 5s. (27) Procuring an account of expenses marked by the clerk, lodging the same with the Auditor, getting diet fixed, and intimating the same, with copy of the account, to opposite agent, 3s. 4d. and 5s. (28) Framing account of expenses, per sheet, 1s. 6d. and 2s. (29) Ordering, procuring, and examining extract, 3s. 4d. and 6s. 8d. (30) At the end of each process, there shall be allowed to the agents a fee, to be called "Process Fee," to cover all general consultations during the progress of the case, and communications written or verbal between the agent and client, 10s. and from 10s. to £1, 10s.

7. CORRESPONDENCE.—(1) Each letter not exceeding one sheet, 2s. and 3s. 4d. And for each page or part of a page beyond the first sheet, 1s. and

1s. 8d. But mere formal letters (such as simply transmitting or annexing copies of papers) to be charged each 1s. and 1s. 6d. (2) Telegrams (including attendance transmitting), 2s. and 3s. 4d. (3) Circulars.—Framing same, 2s. and 3s. 4d. Each copy, 1s. and 1s. To be printed if found to be less expensive than copying. Addressing and despatching printed circulars, not exceeding twenty in number, 2s. and 2s. If more in number, at same rate. (4) Ordering advertisements—Each paper, including settlement of newspaper accounts, 2s. and 3s. 4d.

8. Mercantile Sequestrations.—(To be charged entirely under Scale II.) (1) Receiving instructions and explanations to apply for sequestration, and writing mandate, 10s. (2) Attendance obtaining deliverance on the application, 6s. 8d. (3) Drawing abbreviate of sequestration, and getting same entered in Register of Inhibitions, 6s. 8d. (4) Inserting advertisement in each *Gazette*, whether Edinburgh or London *Gazette*, besides the usual fees of drawing the advertisement according to length, 3s. 4d. (5) Obtaining deliverance, declaring election of trustee and commissioners, 6s. 8d. (6) Taking out bond of caution, getting it signed, and lodging, 10s. (7) Taking out act and warrant, and transmitting same to Accountant in Bankruptcy, 6s. 8d. (8) Drawing abbreviate of trustee's confirmation, and copying and recording the same, 6s. 8d. (9) Framing note when first dividend payable, and list of commissioners, and lodging same, 10s. *Note.*—The other charges in sequestrations to be the same as charges for similar or analogous business under this table.

9. Precognitions and Proofs.—(1) No charge shall be allowed for precognitions of witnesses not examined, in the absence of a good and valid reason for such non-examination, and at the audit all precognitions charged shall be produced. (2) No charge shall be allowed for journeys, attendances, or correspondence in connection with the precognition of witnesses, but in lieu thereof, and in addition to the ordinary drawing fees of precognition, so far as relevant and necessary for the case, a charge shall be allowed, to be called "Instructions for Precognition," 6s. 8d. and 13s. 4d., and in addition, reasonable travelling and personal expenses. (3) Perusing record, productions, precognitions, etc., before proof or trial, and preparing for same, 6s. 8d. and 13s. 4d.

10. Plans.—No allowance shall be made for plans lodged in process, except such as are either ordered, or subsequently sanctioned, by the Court, or prepared by mutual arrangement of parties, or proved and put in at the proof.

11. Allowances to Witnesses.—The charges for witnesses attending proofs or a trial shall not exceed the following rates: (1) *Where the witnesses reside in the town, or within four miles of the Court House where the proof or trial takes place:* Labourers, mechanics, servants, journeymen, etc., per day, according to circumstances, from 5s. to 7s. 6d. Tradesmen, shopkeepers, innkeepers, clerks, farmers, manufacturers, auctioneers, etc., per day, according to circumstances, from 10s. to £1, 1s. Gentlemen, merchants, bankers, clergymen, etc., per day, £1, 1s. Professional persons, such as writers or solicitors, accountants, physicians, surgeons, eminent architects, civil engineers, surveyors, etc., per day, £2, 2s. Women, according to their station in life, per day, from 5s. to £1. The above allowances being in full of all the above respective classes of persons shall be entitled to demand for their trouble and maintenance, and no separate charges shall be allowed for hotel expenses or otherwise, in respect of witnesses. When less than a day is occupied, a corresponding reduction to be made in the allowance. (2) *Where the witnesses do not reside in the town, or within four miles of the Court House where the proof or trial takes place:* They shall be allowed at the above rates for the time necessarily occupied by them in going to, remaining at, and returning from the place of proof or trial, besides reasonable travelling charges going to and returning from the place of proof or trial, according to their rank and station of life, and with reference to the means of conveyance to and from their respective places of residence, such as steamboats, railways, etc. The said allowances for travelling shall not exceed in whole the rate of sixpence per mile for going to, and the same for returning from, the place of proof or trial; and in cases where it is found necessary to

employ professional or scientific persons, such as physicians, surgeons, chemists, engineers, land surveyors, or accountants, to make investigations previous to a proof or trial, in order to qualify them to give evidence thereat, such additional charges for the trouble and expenses of such persons shall be allowed as may be considered fair and reasonable, provided that the Sheriff shall, on a motion made to him either at the proof or trial, or within eight days thereafter, if the Court is in session, or if in vacation, within the first eight days of the ensuing session, certify that it was a fit case for such additional allowance. Receipts or vouchers for all the sums stated as paid to witnesses shall be produced to the Auditor at the taxation of the account, otherwise the same shall not be allowed. The names of the witnesses examined at the proof or trial shall be stated separately from those not examined; and if the expenses of all or any of the latter class of witnesses shall be demanded, the grounds or reasons for such demand shall be stated, as, for example, that the witness was in attendance to prove a certain fact or writing which the opposite party had previously refused to admit, but which was admitted at the proof or trial, whereby the examination of the witness was rendered unnecessary; or (in the case of a defender) because the pursuer had failed to prove his case, in consequence of which the defender's witnesses were not examined, but in this latter case it ought to be shown that all the witnesses charged for were necessarily cited, or in attendance, the general rule being that the expense of witnesses not examined shall not be allowed unless a good and valid reason shall be assigned for their non-examination. In the absence of a note in terms of this direction, the witnesses not examined shall be disallowed by the Auditor.

12. SHORTHAND WRITERS.—(1) Attendance at proofs and commissions, not exceeding per hour (besides reasonable travelling charges when necessary), 5s. and 5s. (2) Extending notes, per sheet, 1s. and 1s. 6d.

13. APPEALS.—(1) Marking appeals to the Sheriff or the Court of Session, 2s. and 3s. 4d. (2) To the respondent's agent for inquiring as to appeal lodged, 2s. and 3s. 4d.

14. AUDITOR'S FEES.[1]—(1) Decrees in absence, 2s. 6d. (2) In litigated cases, and under diligence—When the account is under £10, 2s. 6d.; £10 and under £20, 5s.; £20 and under £50, 7s. 6d.; £50 and under £75, 10s.; £75 and under £100, 15s.; £100 and under £150, £1, 1s.; £150 and upwards, £1, 11s. 6d.

15. PERSONAL DILIGENCE.—(1) Recording execution of charge, 2s. and 3s. 4d. (2) Procuring fiat, 2s. and 3s. 4d. (3) Instructing apprehension, 3s. 4d. and 6s. 8d. (4) State of debt and attendance at settlement, 3s. 4d. and 6s. 8d.

16. SALES.—(1) Fee on reporting sales under poindings or sequestrations, or any other judicial sales, including procuring approval of roup-roll, 2s. 6d. and 3s. 4d. (2) Fee on obtaining warrant to pay, 2s. and 3s. 4d. (3) Fee for conducting sale, exclusive of the auctioneer's fee, when the amount of the roup-roll is under £100, at the rate of £5 per cent.; for all above, £2, 10s. per cent.; besides personal expenses and other necessary outlay.

17. PROCURATOR-FISCAL.—For his concurrence, 2s. 6d. and 3s. 4d.

II.—For Executry Business.[1]

(So far as not falling under the foregoing table.)

1. PETITION FOR DECREE-DATIVE.—(1) Presenting petition and directing publication, 6s. 8d. (2) Attendance in Court, moving for and obtaining decree-dative, 6s. 8d.

2. FOR INVENTORY OF MOVABLE ESTATE.—(1) Fee obtaining the necessary information relative to the nature of the movable estate and all other particulars requisite for the preparation of the inventory, 6s. 8d. *Note.*—In place of this fee it shall be in the option of the agent to substitute detailed charges for all necessary business requisite for the preparation of the inventory, the rates of charge being regulated by this table, but in that case he will not be entitled to any *ad valorem* fee for procuring confirmation. (2) Drawing inventory and oath—*per sheet*, 6s.; extending ditto—*per sheet*, 1s. 6d. (3) Attendance with

[1] Under this heading the charges for both Scales are the same.

the executor, before the Sheriff or Justice of Peace, when oath taken, 6s. 8d. (4) Agency taking out bond of caution, getting it subscribed, and lodging it with the clerk, 6s. 8d. (5) Agency procuring attestation of cautioner's sufficiency, 3s. 4d.

3. WHERE IT IS NECESSARY TO OBTAIN RESTRICTION OF CAUTION.—(1) Fee on interlocutor ordering advertisement, 6s. 8d. (2) Fee on interlocutor restricting or refusing to restrict caution, 6s. 8d.

4. FOR PROCURING CONFIRMATION.—Where the value of the estate does not exceed £100, 5s.; £250, 10s.; £500, 15s.; £1000, £1, 1s.; £2000, £1, 11s. 6d.; £5000, £3, 3s.; upwards of £5000, £5, 5s.

III.—Trials under § 23 *of the Act* 16 *and* 17 *Vict. cap.* 80, *and under* § 52 *of the Act* 39 *and* 40 *Vict. cap.* 70.

(1) Charges for taking instructions, attendances, and precognitions, to be the same as under this table in ordinary cases. (2) A debate fee to be allowed for the diet at which the proof is led and the parties heard and judgment given, not by length, but a single fee of £1, and from £1, 10s. to £3. This fee only to be charged once in course of any case tried under these sections.

IV.—Causes under 1 *Vict. cap.* 41, § 4.

Where a cause is remitted to the Small-Debt Court Roll under § 4 of the Small-Debt Act, there shall be allowed in respect of the trial of the cause, to cover every trouble, a fee of £1. JOHN INGLIS, *I.P.D.*

The Vacant Sheriff-Substituteship of Nairnshire.—In answer to a question by Mr. Mackintosh in the House of Commons on the 13th ult., the Lord Advocate stated that the Government proposed to appoint a gentleman to discharge the duties of the vacant office, but that it was not intended that he should be a resident judge; that the office, in accordance with the recommendation of the Lords Commissioners in 1860, would be united to that of a neighbouring Sheriff-Substituteship. In plain English this means that the office is not to be filled up on its former footing; in acting thus the Government is only carrying out a plan which has been for several years in operation—the suppression of every office connected with the administration of law in Scotland the duties of which can possibly be transferred to existing officials. We are not aware whether the amount of business which was transacted in the Sheriff Court of Nairn warrants such a step being taken, but we may be allowed to hope that in thus increasing the work of neighbouring Sheriffs-Substitute an increase of their salary may be taken into consideration. There is probably no class of public servants who are worse paid at present than Sheriffs-Substitute, considering the position which they hold in a county and the admirable way in which, as a body, they do their work. Compared with corresponding officials in England and Ireland, it must be confessed they are as a rule miserably underpaid, and we trust that the Government will shortly see its way to a comprehensive scheme of rearrangement of their salaries; it is a matter which has long been talked of, but now when the country has been saved the salaries of numerous offices which have been suppressed it is surely time that something was done.

The Vacancy on the Bench.—In answer to a question in the House of Commons by Colonel Mure, the Home Secretary stated that some legislation would "probably" be brought forward after the recess which would render it unnecessary to fill up the post. This has been a stereotyped answer for so long that we really despair of anything being done. We have so repeatedly referred to the subject (vol. xxii. pp. 430, 609) that it is useless reiterating our views in regard to it. We can only once more state the fact that for two years the Act of Parliament regulating the number of Judges in the Supreme Courts of Scotland has been ignored or deliberately set at defiance.

The Lord Clerk-Registership.—We understand that Mr. Cross intends visiting the Register House with a view of making himself acquainted with the general mode of conducting business there. The Right Honourable gentleman will probably be accompanied by an official of the Treasury. Meanwhile, owing to the delay in filling up the appointment of Lord Clerk-Register, the election of a representative Scottish Peer to sit in Parliament cannot be proceeded with although there is a vacancy at present among the Peers.

The Court of Session and its Work.—Nobody can help admiring the rapidity with which the Court of Session has done its work this winter session, notwithstanding the increase to the usual business by the many cases in connection with the City of Glasgow Bank. If the proposed Bill to appoint an arbiter to dispose of these cases ever comes before Parliament, it will probably be found that by that time there will be no more cases to dispose of, a fact we think which will rather astonish our English friends, who are probably the persons who think that arbitration would be the more expeditious manner of working, accustomed as they are to the necessarily leisurely procedure of Courts overworked and undermanned.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF LINLITHGOWSHIRE.

Sheriff-Substitute Home.

HENRY WATSON, PETITIONER.

Cessio Bonorum—Competency of a petition, where there was no condescendence or note of pleas in law—Sheriff Court Act, 1876, *secs.* 2, 6.—On 2nd November 1878 a petition for *cessio bonorum* was presented to the Sheriff of Linlithgow, Clackmannan, and Kinross. There was no condescendence or note of pleas in law, but the petitioner asked "warrant for interim liberation, on his finding caution and the cautioner binding himself in terms of the 'Sheriff Courts (Scotland) Act, 1876;' and thereafter, on resuming consideration of the

petition, and advising the whole cause, to find that the petitioner is entitled to the benefit of *cessio bonorum*, and to grant decree accordingly."

The Sheriff-Substitute issued the usual interlocutor, fixing 6th December for the petitioner's examination, and appointed intimation to be made to the incarcerating creditor of the craving for interim liberation, and that parties would be heard on 5th November. The incarcerating creditor did not appear and the petitioner was therefore liberated. What followed appears from the record of the proceedings on 6th December :—

"*Linlithgow, 6th December* 1878.—Petitioner present and Mr. Gardner, solicitor, Bathgate. Dodds, solicitor, Bathgate, appeared for D. Hutcheson, clothier, Glasgow, the incarcerating creditor, and objected to the competency of the present petition as not being brought in the form prescribed by the Act 39 and 40 Victoria, cap. 70, being the Sheriff Courts (Scotland) Act, 1876, and referred to the case of *Crozier* v. *Macfarlane & Company* (15th June 1878, 15 Scottish Law Reporter, p. 630), and craved that the petition be dismissed and the warrant for interim liberation recalled. Gardner for the petitioner supported the petition.

"The Sheriff-Substitute having heard parties' procurators, sustains the objection, dismisses the petition, and recalls the warrant for interim liberation, and decerns. FRANCIS HOME."

Act.—Gardner.——Alt.—Dodds.

Notes of English, American, and Colonial Cases.

SOLICITOR AND CLIENT.—*Taxation of bills of costs after payment—Re-opening settled accounts—"Special circumstances."*—Bill of costs will be referred for taxation though paid more than twelve months before action commenced, and settled accounts between solicitor and client opened where the Court is satisfied that certain charges are exorbitant and improper, and that the business charged for was unnecessary, and that the solicitor has exercised undue influence.—*Watson* v. *Rodwell*, 47 L. J. Rep. Chanc. 418. Overcharges are "special circumstances" within the Act (6 and 7 Vict. c. 73, ss. 37, 41) entitling a client to have his solicitor's bill referred to taxation after the twelve months have expired.—*Re Robinson*, 37 L. J. Rep. Exch. 11, approved of.—*Ibid.*

TRADE-MARK.—*Trade-name — Injunction — Fraud — Form of decree.*—A manufacturer using, to describe articles made by him, the name of another manufacturer, must justify the use thus made of a name not his own, by showing that such name is understood by the trade and the public to denote a patented or other article of a particular type, structure, or arrangement of parts, and not a mark or sign of a particular manufacturer. It makes no difference in this principle that such name does not appear upon the articles sold, but only in advertisements or price lists ; nor that the articles bear the selling manufacturers' own trade-mark and labels, stating them to be manufactured by him, and that statements to the same effect appear in the advertisements and price lists.—*The Singer Manufacturing Company* v. *Wilson* (H.L.), 47 L. J. Rep. Chanc. 481. Per the Lord Chancellor and Lord O'Hagan (*dubitante* Lord Blackburn). Fraud is not necessary to be alleged or proved in order to obtain protection for a trade-mark.—*Ibid.* The Singer Manufacturing Company sought to restrain an alleged improper use by the defendants of their trade-mark or trade-name. They alleged by their bill that they had attained great reputation as makers of sewing-machines; that the sewing-machines made by them were sold as Singer machines; that the term Singer was used by them and understood by the public as denoting machines of their manufacture, and not any specific principle of construction or mechanical arrangement of parts ; that the defendants made and sold machines describing them in price lists and advertisements as Singer machines, whereby purchasers

were likely to be and had been misled into the belief that the machines so sold by the defendants were of the plaintiffs' manufacture. The plaintiffs tendered affidavits in support of their allegations. The defendants tendered affidavits, and applied for leave to adduce *viva voce* evidence in reply to the plaintiffs' evidence. The Master of the Rolls held that the plaintiff's evidence would not, even if uncontradicted or unshaken by cross-examination, entitle him to relief, and that it was unnecessary to consider the defendants' application, and dismissed the bill with costs, without reading the defendants' affidavits. The Court of Appeal affirmed this decision. On appeal to the House of Lords, their Lordships expressed their disapproval of the form of the decree, as calculated, in a case where there may be a rehearing and an appeal, to lead to delay and expense, and they remitted the case to the Chancery Division for the production of the defendants' evidence.—*Ibid.*

LIBEL.—*Felon—Effect of undergoing punishment.*—In an action of libel for calling plaintiff a "felon," it is no justification to show that plaintiff has been convicted of felony, without showing that he actually committed the felony. And *per* Brett, L.-J., and Cotton, L.-J., it must also be shown that the plaintiff has not undergone the punishment awarded to him for his offence, so as to be purged therefrom.—*Leyman* v. *Latimer*, 47 L. J. Rep. Exch. 470.

INSURANCE COMPANY.—*Winding up—Compromise with contributories—Costs of winding up.*—An insurance company of unlimited liability, registered under 7 and 8 Vict. c. 110, granted policies of insurance, by which the insured had no claim against the shareholders beyond the amounts unpaid on their shares. In 1868 the company was ordered to be wound up, and the whole of the unpaid capital was called up and applied in paying the debts of the company. Some of the shareholders entered into compromises with the liquidator, in manner provided by the Companies Act, 1862, s. 160, and Rules of 1862, Schedule III. Form 50. The amount received under the compromises was less than the amount remaining unpaid on the shares of the compromising contributories. A further sum being required to pay the costs of the winding up, the liquidator took out a summons that a call might be made on the contributories other than those who had compromised :—*Held*, that the whole of the sums received from contributories who had compromised were applicable in payment of the debts, and that the further sum required for payment of the costs of the winding up was to be provided by those contributories only who had not compromised. *Re The Accidental Death Insur. Co.*, 47 L. J. Rep. Chanc. 396.

POWER.—*Gift of fund in portions—Fund insufficient—Appointment by successive instruments.*—The donee of a special power to appoint (subject to a life-interest) a sum of £3000 raiseable out of the proceeds of two policies and of certain real property, made three appointments by successive deeds of £1000, described as part of the £3000, in favour of three objects of the power. The property available eventually, owing to the insolvency of the insurance office, fell short of £3000 :—*Held*, that the appointees took according to priority of appointment, and not rateable portions of the fund.—*Stokes* v. *Bridgman*, 47 L. J. Rep. Chanc. 759.

The principle of *Page* v. *Leapingwell* is only applicable to gifts by the same instrument, or by instruments which, for the purpose of construction, are to be treated as one.—*Ibid.*

Held also, that the sums appointed were not to be answered rateably by the different properties from which the £3000 was raiseable, but that each £1000 in its entirety was charged upon the aggregate fund.—*Ibid.*

CHILDREN.—*Judicial separation—Custody of children.*—In determining the custody of children, the interests of the children are paramount with the Court. In committing them to the charge of the mother when the innocent party, the Court acts upon the principle that a wife ought not to be deprived of the comfort and society of her children by reason of the wrongful act of the husband, but it will depart from the rule when it is for the interest of the children that their education should be free from her control.—*D'Alton* v. *D'Alton*, 47 L. J. Rep. P. D. & A. 59.

THE

JOURNAL OF JURISPRUDENCE.

LAW A SCHOOLMASTER; OR, THE EDUCATIONAL FUNCTION OF JURISPRUDENCE.

BY THE HON. LORD GIFFORD.

BEING THE INTRODUCTORY ADDRESS TO THE JURIDICAL SOCIETY, NOVEMBER 1878.

MY LORD JUSTICE-GENERAL AND GENTLEMEN, MEMBERS AND FRIENDS OF THE JURIDICAL SOCIETY,—On the opening night of our one hundred and fifth session, I greet you well. Every epoch of progress, every marked point in evolution, every new page in history or in life, is, or ought to be, a festival, on which, pausing as it were but for a moment, we *rejoice* at once in the memories of the past and in the hopes of the future. We rejoice, I say; for rightly understood, here or hereafter, every history and every life will at last be found to be but an unfolding of joy. Gladly I join with you, therefore, in this our recurring celebration. Each opening winter is to us the green spring of our intellectual year, and gathering what we may of the spring flowers, which are at once the "immortelles" of our past and the fresh buds of our future, I desire to unite with you to-night, and for one short hour, in twining, however loosely, some sort of wreath, however frail, which may serve, at least for an hour, as a chaplet for the tomb of departed sessions, and as a garland for the fresh youth and promise of the session which opens on us to day.

Quitting for a moment the language of metaphor, you have honoured me by asking me to deliver an introductory address to the Juridical Society of Edinburgh, and I have tried to find a few thoughts which might be not unsuitable to the place and to the hour. Such as they are, I present them; and I trust to your generous indulgence to forgive their ragged poverty, and rather to imagine what, under more fortunate auspices and in better hands, they might possibly have become.

Law is the leading subject to which your Society is devoted, and legal inquiries and legal discussions occupy most of your evenings; and although, as you (my Lord Justice-General) well remarked at this Society's Centenary, man cannot live by law *alone*, and therefore your constitution wisely demands that speculative

and general subjects shall receive a share of your attention, still I deem it most appropriate that an opening address should bear some relation, or have some kinship or affinity, to the great theme which gives your Society its name. It would be strange if one should wander into foreign fields for fitting words wherewith to welcome a Legal Society.

I have selected as a topic, perhaps not unsuitable, and certainly not barren or unfruitful, "Juridical Science viewed strictly as an Engine for the *Education of Man*." I have ventured to entitle this address as "*Law a Schoolmaster; or, The Educational Function of Jurisprudence*," and, with a topic so vast and so fertile, my only difficulty will be to cull only the leading principles, and to compress within reasonable compass only the essential elements.

If the question were put, What is the great and leading purpose and end of Jurisprudence or Law in any state or nation? it would undoubtedly be a true and correct answer to say, The protection and security of life, liberty, and property among all the members of the community. And that law and that system of jurisprudence is the best, which most perfectly accomplishes this object.

Every civilized community or state must select those rights and duties, the protection and enforcement of which it deems essential to the general wellbeing. It must *select*, I say; for it is not every right and every duty which can be enforced by law even in its most perfect form. An old Scottish lawyer quaintly said, "You cannot *poind* for charity," and so you cannot by any decree *ad factum prœstandum*, or by any form of diligence, compel kindness, or consideration, or courtesy—the highest duties are ever outside the region of earthly law.

Still there are some duties and some rights which may, in some good measure, and in a reasonable degree, be secured in observance and enjoyment by wisely framed laws; and each state will select for definition and enforcement (and the selection will constantly vary according to circumstances) what it deems most essential for the commonweal. And this commonweal, or the greatest possible good and wellbeing of the community, is and ought always to be the great end and object of every system of law. This is what may be called *Law's chief end.*

But every mechanism in action, especially when the machinery is vast and complicated, besides serving its primary purpose, produces besides many indirect and incidental consequences. This is only an illustration of a principle of the very broadest and widest application, the principle, namely, that every cause produces—every single cause produces—*more than one effect.* Thus you cannot by any process produce *intense heat* without at the same time producing light and expansion and electricity, and various chemical results, and so in other cases which I need not mention. The principle is so well recognised that, in the language of evolution, it [illegible]t an established name. It is called the "Law of *the multi-*

plication of effects," and hence the ever-increasing complication of all human and of all earthly affairs.

In accordance with this law, every system of jurisprudence, with the machinery necessary for its application, besides accomplishing more or less perfectly its primary object, the security in society of *life* and liberty and property, produces a vast number of indirect incidental and consequential effects, many of which are of striking interest, and some of which operate continuous, enduring, and momentous changes in the lives, character, and progress of the people subjected to their influence.

To one of these indirect influences of any system of law I propose to ask your attention for a short time to-night. I venture to call it the *Educational Influence of Law*, and I trust the topic will not be deemed inappropriate as an introduction to your winter session.

Yes, Law is indeed an *educator*, a *teacher*, and the education which he gives is national, universal, and compulsory. In his ample schoolrooms there are places for all, and the pupil people, willing or unwilling, must learn his rigid lore, and what is more, they never fail to reach the standards of the appointed code. If the teaching is good and the standards high—if the law is just and right and noble—blessed be the people, assured of an onward and an upward course, ever nearing perfection's sacred heights. But the converse holds also; and if the teaching of law is bad—if the national code is unjust and unrighteous, or low and degrading, so assuredly will the nation be; and under such tuition it will sink downward towards barbarism and blackness and death. Individuals may sometimes here and there rise above unjust and debasing laws; but never until the law be holy and its atmosphere be purged, never till then can the masses of the population breathe pure air, and either see or rejoice in the light of heaven.

Now, if law or jurisprudence—the law or jurisprudence of any country—be an educator or teacher, perhaps the first question is, What does it teach? And here the motto of your Society, taken from the Roman Law, supplies me with a full and adequate answer, "*Jurisprudentia Justiciæ Scientia.*" Jurisprudence or law is the science of justice, and therefore *justice* must be that which jurisprudence teaches, inculcates, and enforces. If I am asked again, But what is justice? Is it a thing which can be fixed and defined, or is it not a variable relation, a fluxion ever changing, an incommensurable quantity which cannot be limited either in words or in figures? To reply to this question, I think I cannot do better than betake myself to the same source as that from which you have drawn the motto which forms the legend on your emblazonment; and I trust that a "Juridical Society" will not deem me pedantic if I reply in the words of Ulpian, "*Justicia est constans et perpetua voluntas suum cuique tribuendi.*" Justice is the constant and eternal will and effort to render unto every one his

due; to which I add, with the later commentators, "*et tributio vel distributio ipsa,*" and the actual rendering or awarding to each that which is his own—*suum cuique*—that which belongs to each as his own and in his own right, which is his property, his earning, his desert.

And if any exigeant and inquisitive hearer presses me still further, and unreasonably demands that I shall exactly and precisely tell him what is this right which belongs to every man—what is this "*jus suum cuique tribuendum*"—this proper and peculiar and inalienable heritage of each man, which he may demand as of right, and which none may deny or withhold? I am ready to meet this insatiable questioner also, and I say to him—adopting the definition of Herbert Spencer—that the *right* which belongs primarily, absolutely, and indefeasibly to every man, and of which no man can be deprived without outraging the laws of Heaven's Chancery, is "the right to exercise and enjoy to the fullest and to the uttermost *all the faculties* which God has given him, limited only by this, that he shall allow, and not interfere with or destroy, precisely the same liberty and enjoyment in every one else." I regard this as one of the best definitions of primary human right which has yet been framed. It admits, if applied accurately, of being wrought out to the uttermost, and of being successfully carried to the minutest particular of infinite detail. It is the technical embodiment and the scientific expression of the principle upon which rests the Divine precept, "Whatsoever therefore ye would that men should do to you, do ye even so to them;" "this is the law and the prophets." This is the root and foundation of that eternal equity or equality which rules over all, and which flows from the Divine nature itself. "O house of Israel, are not my ways equal? saith the Lord." And so in a mysterious sense it is said of the city of God, the perfection of holiness, "The length and the breadth and the height of it are *equal.*"

So much shortly for definition—necessarily very shortly, for I cannot stay to vindicate the definitions in detail. I know well how true it is that "*omnis definitio difficilis est et periculosa;*" and if in the judgment of any I have not succeeded, I trust I will not be without some little credit for having at least boldly faced both the difficulty and the danger.

Having thus seen what is the nature of that justice or equity, to teach and to impress which is so important a function of jurisprudence, I have next to remark that this justice or equity so taught does not cover or embrace the whole field of morality or ethics. Speaking generally, and without any attempt at strict scientific accuracy or precision, ethics or morality may be said to consist of three great regions or departments, which may be briefly characterized as embracing man's duty to his God, his duty to himself, and his duty to his neighbour. Now it is only the last of these three great divisions which, properly speaking, forms the

province of jurisprudence or municipal law. Such law—municipal law—has only to do with man in society, with the rights and duties which arise to him as a social being, as a member of a community or a state. It is very important in many regards that this distinction should be kept clearly and prominently in sight. Jurisprudence—human municipal law—has no concern, directly and immediately, either with a man's duty to his God or with his duty to himself; and any attempted interference with either province for itself and for its own sake, and apart from society, is not only really impossible, and sure ultimately to be useless and abortive, but such interference is always injurious, and is forbidden by the highest and most sacred principles of ethics and morality; and the contravention of these principles has in all ages been fraught with unmixed mischiefs and untold miseries.

To try to fix, to define, and to enforce a man's duty to himself alone, and apart altogether from the interests and the rights of his fellows, would be to ignore and to destroy that equal and inalienable right which I have already claimed for every man to use and enjoy to the fullest all his faculties, provided only he leaves entire and untouched the very same equal use and equal enjoyment to every other. His rights can only be limited by the equal rights of his neighbour—using that word neighbour in its widest sense as including all men and their descendants. Beyond that the question must be left to each man himself and to his Maker, whence he came.

The case is still worse when positive law attempts to define and enforce, apart from the rights of society, a man's duty to his God alone. Who art thou, O man! O legislator! who venturest to fix and limit and arrange the claims and rights of the Almighty?

But while all this is true, it must not be forgotten that the unity of man's life and being produces a very close, and perhaps inseparable, connection between all his rights and all his duties, however they may be classified. It is frequently difficult, and often impossible, to say how far society is or is not interested in a man's private conduct, in his hidden acts, or even in his thoughts or his secret devotions; and there will always be a wide debateable territory in which the interference of positive law may sometimes at least, according to circumstances, be imperative or permissible. All these questions, however, open vast fields of inquiry, upon which I cannot enter, but at which I can only rapidly glance as I pass on. And I proceed, therefore, to show or to indicate how it is, and in what ways it is, that jurisprudence or municipal law acts as a powerful and effective teacher or educator of the people in the principles and in the practice of social justice or morality. Here, again, I can do little more than name my propositions. Your time forbids all argument and all discussion, and I can only suggest the modes in which a system of jurisprudence originates and forms the thoughts, moulds and modifies the

opinions, educes and directs the sentiments and emotions, fixes and perpetuates the habits and manners, and at last governs and controls the whole lives and conduct of the great masses of the population. How is a result so grand and mighty as this effected and brought about? Now, here I observe—

First, That every system of jurisprudence—every code, either written or customary, of positive municipal law, by the mere fact of its existence, operates as an authoritative declaration of what justice and equity really is. Every law, by its enactment or by its recognition and enforcement, virtually asserts itself to be just and right and true. No law, so to speak, ever pleads guilty to being unjust. It always holds itself out as an embodiment more or less perfect of absolute equity.

Now, in morality, as well as in science and in religion, the great mass of mankind are governed solely by authority. Even in relation to the most important doctrines of religion—doctrines involving not only temporal but eternal interests—the beliefs and the conduct of untold multitudes are governed and regulated simply and solely by what they have been told by those whom they accept as their authorized guides and directors, and whom they accept as such sometimes on the slenderest and the most infirm grounds. Do we not see in every country and in every nation that the religion of whole peoples and communities is determined by the mere accidents of their birth, or of the society among which their lot has been cast? They belong as a rule to what they call the Church of their fathers; and very often the best reason they can give for any faith that is in them is that it was their father's creed. I am not saying that this is wrong—probably it is inevitable. But I do say that it is a striking instance of how much the masses of mankind are prepared to accept, simply on what in a broad sense I call authority.

So it is with matters of science. Few indeed, very few, are either capable of verifying scientific truth or in circumstances enabling them to do so. The bulk of us must accept on trust what is told us through the recognised channels, and must passively receive the facts so given, and experience shows that we may safely do so.

Now, although morality is different from either religion or science, the case is exactly the same with it, though perhaps not to the same degree. The great bulk of men take their morality—their standards of right and wrong—from tradition, and from the authority of those among whom they live and move. It is vain to talk of morality being instinctive, and always and in all persons everywhere the same. This may be true of certain great moral truths which have been inwrought and practised for centuries, and which have become through many generations inborn parts of our nature, and common to the whole race. But the minuter details of morality vary in different countries and in different ages, and

even in different extended societies and classes of men. Our moral sentiments, the accuracy and the vividness of our moral perceptions, and the certainty with which they act on our conduct, greatly depend on the moral atmosphere in which we live, and on the moral height and lucidity of the society which surrounds us; and this is what I mean when I say that the generality of men take their morality upon authority. They do and feel just as their reputable neighbours do, and they feel and conclude what every one does cannot be wrong.

The deliverance which the municipal and positive law of any country gives upon a question of morality—upon a question of right or wrong—is generally the most weighty and authoritative that can be given. Surely what the law declares to be right must really be so. Surely what the law compels or enforces must be inherently and in the highest sense lawful. No louder, no more commanding external voice can be heard; and as a rule the multitude hear and acquiesce, and the civil or municipal law gives tone and colour to the morality of the nation. Few indeed are the peoples, comparatively few the individuals, who have a higher and nobler scale of morality on matters regulated by law than that which the law itself has determined. It is almost as difficult to rise above the general level of morality as it is to fly above the level of the earth.

And when at last a law is discovered by a few heaven-enlightened minds to be morally imperfect or morally wrong, how difficult it often is to break its thrall or procure its repeal or amendment! How the masses cling to it as good enough for them! How are the reformers stigmatized as utopian or visionary! The wisdom of our ancestors is declared to be better than the speculations of innovators, and the old landmarks are preferred to the new limits and definitions of an upstart ethics. Many a wrong has been perpetuated, not in the outward practice only, but in the hearts and minds and emotions of nations, simply because it has got consecrated by law.

But, second, I proceed to suggest as another reason why the law of any country is a powerful and effective teacher and regulator of its morals this: that by its nature law is permanent, continuous, and enduring, and for lengthened periods it forms and governs the customs of the country in which it is in force. This of course applies pre-eminently to what is called *customary law;* but even statutory law in a very short time affects the habits of the community, and becomes customary too.

I need not remind you of the vast and paramount influence which custom exerts on our feelings and emotions, upon our opinions and our conduct. The proverb says we are the very creatures of custom. Custom has made and formed us into what we are; and have we not all felt the thraldom of custom's chains? Now, custom is not less powerful over the moral part of our nature

than over the physical and intellectual parts of it. Our morality is to a large extent moulded and modified by *custom*, by the universal usage of ourselves and of our companions. The wrong that is done by all soon ceases to be thought wrong, and may even come to be regarded as a kind of virtue; conscience gets seared and hardened, its admonitions cease to be regarded, and the vice which at first

> "Seemed of such frightful mien,
> That to be hated needs but to be seen;
> When seen too oft, familiar with its face,
> We first endure, then pity, then embrace!"

Now, the most powerful and most influential of all customs are *legal customs;* and when legal customs—customs resting upon law—sanction wrong, or warrant or encourage vice or injustice, it is hardly possible to overstate the mischief they will do. A good law, and a righteous or virtuous custom, will elevate and exalt a nation; a bad law, or a vicious custom sanctioned by law, will sink it deeper and deeper in degradation.

Before I pass on, and in order to make my meaning clear, and to illustrate the effect of law upon national morality, let me name two instances. Hundreds of instances might be given, but your time will not admit of more than two, and I select them almost at random.

Take, for instance, the case of the *slave trade.* While this hideous traffic was sanctioned by law, and was *legally*—save the mark!—legally carried on, how difficult, how impossible, it was to get people to see and feel how unjust and how horrible it was! Christian men were proprietors of slave-ships; Christian planters bought cargoes of slaves; Christian churches and ministers were supported by the labour of the stolen negroes. John Newton, who wrote with Cowper the Olney hymns, was long after his conversion the captain of a slave-ship, without apparently a single qualm of conscience, and without the slightest suspicion that he was actor, or art and part a stealer of men, and so on; and what a long struggle Wilberforce and Clarkson and their gallant fellow-labourers had to get the frightful trade abolished! Slaveholding is another instance which comes down to our own day.

But take another case from a different department of the law. Up to a very recent period, only a few years ago, down to the passage of the Intestate Succession Act, the law of succession stood thus: That if a son died without issue, and without leaving brothers or sisters, and survived only by a widowed mother, that widowed mother could not claim a shilling of her only son's succession, though it might amount to thousands—all went to the most distant relatives, or even to the Crown, in preference to and to the exclusion of the mother, who might be left to starve! This has been altered now; but what I want to notice is the striking fact that this law prevailed and was in active force for centuries without producing even a murmur, far less an outcry against its

flagrant injustice. People did not seem to see—they could not see that it was at all wrong. Oh, that is the law! was an answer to every possible remonstrance; and this answer was often given with as much confidence in its validity as if a self-evident moral axiom had been announced. Truly the law is an impressive and successful teacher—it may be of immorality, of rapine, or of wrong. Many other instances will at once occur to all of you—many unjust customs which yet prevail. But I hasten on to say—

Third, That law is a powerful promoter of morality or the reverse, because it occupies so prominent and marked a place in the public eye. It is constantly at work, and constantly demanding and receiving attention and regard, and is often watched with intense and engrossing interest.

In order to produce any effect, or at least any appreciable or lasting effect, on the mind, or on any of the conscious faculties of man, it is necessary that the attention be awakened and aroused. What the mind or the feelings do not observe or do not attend to leaves no trace or impression. When we do not notice a thing, it does not live in our memory, and does not affect our conduct. What passes *unobserved* is ineffective either for good or evil. Virtue or vice may be exhibited in our presence, and if we are otherwise deeply engrossed or asleep, the example will neither mend nor mar us.

Now, law—at least that part of law which affects our daily and habitual social life—is always forcing itself upon our attention. It will not suffer us to forget it. The court-house and the judge, the magistrate, the policeman, and the jail, are seen by us at every turn, and remind us of their office. We are always buying and selling, incurring debt or giving credit, and legal claims of every colour are clamorous on every hand. If injustice reigns and wrong prevails around us, it is impossible for us to avoid the contact and the contagion. How important, then, it is that a companionship so close and inseparable, which plucks our sleeve and invokes our regards so continually, should be pure and elevating.

Lastly, for I do not need to pursue this part of the subject farther, Law is powerful as a teacher either of righteousness on the one hand, or of oppression and offence on the other, because it teaches not by precept and word only, but by example, by external and forceful acts and deeds.

The sword is not borne in vain. The accuser and his myrmidons go about the streets. To the bar of justice is haled the offender, and the prison doors close on the convict. The courts are open, rights are reasoned on, and men implead one another. Decrees are pronounced, and judgment issues to the uttermost farthing; and all is done in the broad and open face of day. If law be a teacher, his schoolrooms are numerous, and the apparatus for his teaching is impressive and complete.

Having thus obtained, avoiding all details, a very brief and cur-

sory glance—but I trust a sufficient one—of how law or jurisprudence acts as a schoolmaster or teacher of justice and of a large department of ethics, I again remind you of what I have already frequently indicated, that the teaching may be downward as well as upward. It may be false as well as true. The law may be a very "Fagin," instructing his pupils how to steal, or it may be a saint, teaching how to benefit and bless. It may elevate and improve almost indefinitely the morality, the manners, and the habits of a country, or it may depress and degrade them, and draw them backward to savagery or to death. I venture to think that sufficient importance has not been attached to the teaching power of law.

But there may possibly be suggested in some minds a difficulty, arising from the supposed inherent, eternal, and universal nature of moral truth. How can positive law of any kind, and however enforced, affect morality, which rests on a different basis altogether, which is written on the heart and the mind of man.

Now, to obviate this possible objection, it is enough to consider that it is not moral truth which is affected by jurisprudence or municipal positive law, but only *moral science;* not the truth itself, but only man's knowledge and perception of it. Moral truth, like every other kind of truth, is unchangeably and eternally the same. It is founded in the nature of *things,* as it is called—that is, in the nature of God. But moral *science*—that is, man's knowledge, man's *scientia* of morality—is constantly varying, now advancing, now receding; and *moral science,* like every other *science,* is essentially progressive and capable of indefinite and infinite advancement. It is exactly the same with every other subject. The truths of astronomy or of mathematics or geometry are eternal and unchangeable. But the *sciences* of astronomy and of geometry are for ever imperfect and progressive, because they relate to the imperfect nature and the limited faculties of man. The very expression, "*the teaching of science,*" implies imperfect minds which are to be informed and enlightened by the teacher.

Now, the science or knowledge of morality is often in a very imperfect condition. Men do not *know,* except in a limited degree, what is true and just and right; and the thought — the single thought—which I present to you to-night is, that law is a most important and a most effective instrument for communicating and advancing that knowledge.

But when we speak of the progress of morality or of justice in a nation, we mean a great deal more than the mere theoretical knowledge of the principles of morality or justice. We mean also, and we mean chiefly, the practice of morality and justice, the carrying out of these principles in the thought and sentiments, in the emotions, and in the actual conduct of the people. A moral people is a people who know and love and do righteousness, whose perception of justice and good is keen, whose conscience is tender, and

whose obedience to its dictates is prompt and decisive. This alone is practical morality. Now, in this broad and only important sense morality is necessarily a progressive, or it may be a retrogressive, thing, and its actual state depends, in any nation and in any age, upon, in one word, the *culture* of the nation or of the time. This might be proved by an examination of the nature of morality in theory and in practice, but to do this would involve a very extensive and elaborate consideration of all the different and discordant theories of morals which divide philosophers, and which have led to endless controversy. Fortunately, any such examination is needless, as it would be impossible here and now; for all the theorists, however they may differ as to the source or origin of morality, all agree in this, that the perception, practice, and prevalence of morality always depend on the culture of the community. In other words, that practical morality may and must be *taught;* and this is enough for our present purpose.

It is pleasant to find this agreement among all the hostile sects: the intuitional moralists, who hold to implanted instincts; the utilitarian theorists, who maintain that virtue and utility are one; the selfish system, which insists that virtue is only enlightened self-love; the sympathetic theory; the association theory; and all the others—nay, even the atomists and so-called materialists, who can trace and find the earliest manifestations of morality in the first shiver of the protoplasm at the impact of a speck—all—all concur in this, that whencesoever it came, morality, to be pervading and active and effective, must be cultivated and taught; and my word to you to-night is, that law is the best, the most effective, and the most successful teacher.

I do not want to draw invidious comparisons, or to display different instrumentalities, as if they were rivals to each other, and therefore I abstain from measuring against or in comparison with the law the influences of the pulpit, the lecture-hall, the academic chair, the press, or the literature of a country, or any of the other organizations which teach, or impress, or advance practical ethics. There should be—there is—no unworthy jealousy in the common work. Fellow-labourers in the field of the world all unite in efforts to cover with smiling verdure a stubborn soil, and all anticipate alike a glorious harvest when, with rejoicing and blessing, the ripe sheaves shall be carried home.

One encouraging thought I may notice, in which also I think all the sects agree. It is this: the great doctrines of *heredity* apply in their full force and vigour to *morality.* Moral qualities and moral habits are transmissible from father to son, and from generation to generation, and once rooted and fixed they become congenital and inherent in the race, and perennially flourish as the ages flow. Virtuous parents produce virtuous offspring. The children of the just are blessed. Is it not matter of thankfulness and rejoicing that in the case of every new individual—of every

new child—we have not, so to speak, to begin at the beginning again. We have not the same rocks to blast and boulders to remove and weeds to eradicate—the soil comes to us prepared. The inheritance of holiness descends. The flying torch is passed from hand to hand and burns brighter as it runs. The advancement of justice and of morality is not the labour of Sisyphus endlessly to be renewed; the results of the past are never lost. Each generation takes up the work where its predecessor left it and adds to the rising pile, till, like a cathedral built by many generations, there soars to heaven the Temple of the Lord.

In drawing towards a conclusion—for I feel I am trespassing too long on your indulgent patience—I propose, by way of practical application, as a preacher would say, to consider in a few sentences the bearing which the educational function of law should have upon the action of the various classes who have anything to do with the advancement, administration, or improvement and amendment of the law.

Disregarding other and minor organizations, I think I may say that the three sources to which we chiefly look for the advancement, improvement, and perfecting of our law are these: First, the *Legislature*, who have the direct duty of enacting, repealing, or amending law. Second, the *Judicial Institutions* of the country, by whom the law is administered and applied; the whole courts of the country, with all the machinery needed for their efficiency. And third, what I may perhaps call in a wide sense the Jurisconsults of the country, or those who by study and thought are striving to become so. This class includes occupants of legal or ethical chairs, all students of law, all legal authors or writers, all law practitioners or law advisers in all departments, all legal bodies, and all societies such as yours—all "Juridical Societies" of every kind.

A word or two as to each of these three classes.

First, Would not the legislators of both Houses of Parliament, and all who can or may influence them, do well to recollect that every law they enact, and every section of every law, has an educational and moral influence on the whole masses of the people whom they govern. Laws are directed not to brute matter, but to moral agents; and you cannot command a moral agent to do or to abstain, to act or to suffer, without affecting his moral character, and it may be moulding or modifying his whole future life. Is this not, sometimes at least, forgotten? Legislators are in general quite alive to some of the effects of their laws. How will they tell upon the nation's wealth, or health, or prosperity, or power? What will be their effect on commerce, or competition, or foreign relations? Will they increase or diminish production? Will they cause influx or outflow of gold? and so on. But the nation's highest wellbeing is the nation's *morality*—its love of the right and the true and the good; not its gold or its power, but its virtue, its

self-command, its justice. And are these always as much thought of as they should be when a law is to be made? I leave the question without an answer, and into the details I cannot go.

Second, I take next our judicial establishments—all who have anything to do with the administration of law.

All our courts and tribunals should be great schools of equity and justice, constantly teaching and illustrating high and pure ethics. All who frequent them, all who hear of them, judges and counsel, agent and spectators—ay, and suitors too—should be made to feel that all are striving after only one great end—the attainment of the absolutely right and just, and its exhibition as the law and rule of conduct. How this dignifies and glorifies the most trivial cause! The question is not about some petty right or some passing and evanescent interest, but about what is the binding and eternal rule. The court is not measuring, or weighing, or awarding inches of earth or ounces of yellow metal, but is striving to ascertain the perennial rule of deathless spirits; and above and behind and through all its judgments should shine a light that is supernal and divine. But I hasten to notice—

Third, The action, function, and duty of speculative *Jurists*, such as your Society, in relation to law viewed as an educational power.

I confine myself to the Juridical Society, although what I say is equally applicable to legal professors or legal authors, and indeed to all students of law.

Your position, Members of the Juridical Society, instituted for the discussion of legal questions, is peculiarly favourable and eminently fortunate. You may without fear or fetter absolutely follow out the right and just and true. There is never anything to hinder you. Legislators may often see the ideal right but be unable to realize it. Parties and factions must be consulted and conciliated; obstructions must be soothed or softened; vested interests, though founded in venerable wrong, must be regarded and respected; and even omnipotent Parliament cannot always do the thing it would. Courts, too, are hampered by rule and form. Where the words of a statute are clear and unambiguous they must often disregard its injustice, and a *series rerum judicatarum* may often prevent the judgment which absolute equity requires. Where the words of a statute forbid, or where the point is absolutely ruled by precedent, it is vain to talk of equity to Lord Adam, or of eternal justice to the Justice-General.

But *you*, Gentlemen of the Juridical Society, are under no such fetters. Wherever right demands it, you may and you do condemn the statute, and review both the judgment and the judge. The decisions of the last resort are not final to you; and remembering that law must teach nothing that is not eternally true, you may always compare and correct its data by the handwriting that is on high.

In the spirit of this lofty freedom, I bid you God-speed in the session which you are now to begin. May the light of justice illumine all your discussions; may the love of justice burn in every heart; and, as the result of your meetings, may all of you experience that you are nearer the law and the love which is eternal and divine.

RECENT DECISIONS RELATING TO SHERIFF COURT APPEALS.

UNDER the above heading we have noted such cases as seem of importance, bearing upon appeals from the Sheriff Court, their competency, and the procedure requisite for their admission to the Supreme Court. In doing this we are much indebted to the admirable digest of such cases contained in Part 3 of the recently-published Digest.

When should an objection be taken to the competency of an appeal from the Sheriff Court? When the case is in the single bills. In the case of *Shirra* v. *Robertson* (June 7, 1873, 11 Macph. 660) such an objection was taken at the debate, and was successful, but the Court did not allow expenses; and if an appeal is withdrawn before it is sent to the roll, the respondent may have to bear the expense which he has unnecessarily incurred in preparing to meet it (*Muir* v. *Lamb*, June 29, 1872, 9 S. L. R. 568). But if the case has been once sent to the roll, although it may not have been put out, the respondent may, on the other hand, be entitled to his expenses. In the case of *Johnston* v. *Roe* (June 24, 1876, 3 Ret. 879) the appeal was withdrawn before it had appeared in the roll for hearing; but the respondent stated that it had been necessary to instruct counsel in order to consider what papers should be printed in the case, and the Court awarded him £55. The Lord President remarked, "If instructions have been sent to counsel in the expectation of the case appearing in the roll, and this was done in good faith, I cannot help thinking that this appeal cannot be withdrawn without payment of expenses. There was nothing premature in the instructions." Under sec. 70 of the Court of Session Act, 1868, provision is made for intimation by the clerk of the inferior court of the fact of an appeal, to the respondent or his agent, "provided that the failure to give such notice shall not invalidate the appeal; but the Court of Session may give such remedy for any disadvantage or inconvenience thereby occasioned as may in the circumstances be thought proper." As applicable to this section the following decisions may be noticed. In the case of *Macdonald* v. *Malcolm* (Jan. 18, 1870, 8 Macph. 419) the Court, in consequence of the non-appearance of the respondent, delayed consideration of the cause for a week, in order that the appellant's agent might intimate the appeal to the agent of the respondent; but they indicated

that such a course might not be taken in future. In the absence of the respondent the Court have more than once felt the difficulty of ascertaining whether the provisions of sec. 70 as to intimation has been complied with. In the case of *Stewart* v. *Stewart* (May 16, 1871, 9 Macph. 740) the Court ordered the appellant to ascertain what had been done by the Sheriff-Clerk, and afterwards sustained the appeal, upon the production of letters showing that intimation had been made and accepted. A note of the fact of intimation made by the Sheriff-Clerk on the appeal is sufficient evidence to satisfy the Court. In the case of *Chisholm* v. *Marshall* (Jan. 17, 1874, 1 Ret. 388), where this had not been done, and no appearance made for the respondent, the Lord President said, "I do not think we could go safely on with this appeal without ordering some intimation, because there is no marking on the record to show that the Sheriff-Clerk has intimated the appeal to the respondent. It is the practice of the Sheriff-Clerk of Lanarkshire to mark on the principal record that an appeal has been taken, and that intimation thereof has been sent by him to the respondent. I think that a very excellent practice, and I take this opportunity of saying, what I have no doubt all of your Lordships will concur in, that we consider it advisable that all the Sheriff-Clerks in Scotland should, although the duty is not imposed upon them by sec. 70 of the Court of Session Act nor by the Act of Sederunt following on that Act, adopt this practice, and mark on the record the fact of intimation having been made." The Court here adopted the course which had been followed in the previous case of Stewart. Sometimes an appeal is attempted to be thrown out upon very narrow grounds. Of this the case of *Young* v. *Brown* (Feb. 19, 1875, 2 Ret. 456) may be taken as an example. Under the Act of Sederunt of March 10, 1868, an appellant is bound, within fourteen days of lodging a separate note of appeal, to print and box the note of appeal, records, interlocutors, and proof. The appellant had in this case printed everything except the note of appeal, which had been overlooked, being written on a separate paper. When the mistake was discovered an appendix containing the note of appeal was printed and lodged. It was, however, maintained by the respondent that it was too late, and that, as the Act of Sederunt had not been complied with in time, the case fell to be dismissed. The Court, while admitting that, according to the letter of the Act, the objection was a good one, declined to sustain it. "The objection," said the Lord President, "stands on a regulation of a form of process made by the Court. When we are satisfied that under an Act of Sederunt only a formal or innocent omission has been made, we may allow the thing to be rectified. It has been already rectified by the agent lodging an additional print containing the note of appeal." In the case of *Harvey* v. *Lindsay* (July 20, 1875, 2 Ret. 980) a very singular mistake happened. In an appeal against a decision of the Sheriff, pronounced in an action concluding for £50, the summons

in another action between the same parties was *per incuriam* printed. That action concluded only for £20. The respondent accordingly moved that the appeal should be dismissed on the ground that the amount claimed rendered it incompetent in the Supreme Court. There seems to have been no agent in the case, for the appellant and his counsel, hastily instructed, could give no explanation of the circumstances. Accordingly the Court issued an interlocutor dismissing the appeal as incompetent. The appellant then presented a note craving that this interlocutor should be cancelled, and giving an explanation of the true facts. The Court holding that it had been pronounced under an error of fact, consented to this being done. "It seems to me," said the Lord President, "very much the same as if we had been misled by a misprint occurring in the printed papers, for the printing of a wrong summons is just a very large misprint. The question then comes to be, Is there no remedy for this state of matters except an appeal to the House of Lords? I should be very sorry to find myself compelled to come to that conclusion. On the contrary, I think it is within our powers, the facts being quite ascertained by an examination of the process, to order our interlocutor of the 18th inst. to be cancelled." In the case of Roxburgh & Co. (Jan. 8, 1876, 3 Ret. 288) the Court imposed a penalty of two guineas of expenses in consequence of the appeal being imperfectly printed.

The most formidable objection to the competency of an appeal is that the sum concluded for does not exceed £25. But it must be borne in mind that an action may be competent although the pursuer asks for less than £25. The Court do not necessarily estimate the value of success by the sum sought. If the result of the action will be, or may possibly be, to give the pursuer what is more than £25, the action is competent. This is a well-known rule, and recent decisions afford us some instances of its application. Thus in *Drummond* v. *Hunter* (Jan. 12, 1869, 7 Macph. 347) the pursuer concluded for payment of £12, being a year's rent of certain premises which had been taken by the defenders under a five years' lease, but which they had abandoned before entering into possession. An objection to the competency of an appeal was repelled on the ground that the object of the action was really to determine the obligation upon the defenders as tenants, not for one year merely but for five; that it was equivalent to a declarator; and that a decision upon the question of liability for the first year's rent would be *res judicata*, in so far as that for the subsequent years was concerned. This question has arisen more than once recently in alimentary actions which may involve the obligation to make future payments. In *Macfarlane* v. *Friendly Society of Stornoway* (Jan. 27, 1870, 8 Macph. 438) the pursuer sued the defenders for a small sum, alleged to be balance of aliment due to him during a period of thirteen weeks when he was disabled from working, and he appealed his case on the ground that the question of future aliment

might depend upon the result of his action. But the Court held that the sole question in the case was whether the sum sued for was due. "There is no question of future liability, and can be none. If the pursuer raises another action for aliment against the defenders, it will depend upon the circumstances then existing whether he will get his decree, and not at all upon the decision pronounced in the present case," *per* Lord Justice-Clerk Moncreiff. In the case of *Hamilton* v. *Hamilton* (March 20, 1877, 4 Ret. 688) the question arose whether the amount sued for was above £40, so as to enable the cause to be advocated for jury trial from the Sheriff Court without the leave of the Sheriff. The pursuer, a man over sixty years of age, sought aliment from his son, the defender, at the rate of 2s. 6d. per week. The Court held this to be a claim for more than £40. The distinction between these two cases is too plain to call for any remark. When the pursuer sought to recover a penalty of £20 each from two defenders, this was held to be a cause above the value of £25, and appealable (*Dykes* v. *Merry*, March 4, 1869, 7 Macph. 603). But the most important decisions on this subject are the cases of the *Shotts Iron Co.* v. *Kerr* (Dec. 6, 1871, 10 Macph. 195) and *Aberdeen* v. *Wilson* (July 16, 1872, 10 Macph. 971). In both the same question was raised, in both the same decision was given, but the ground of judgment was not quite the same, and one judge deciding the last had to confess that his judgment upon the first was erroneous. The Shotts case came before the Second Division in an appeal from the Sheriff Court of Lanarkshire. It took the form of a petition praying for the delivery of certain lambs, or otherwise for the payment of £10, "or such other sum as shall be ascertained to be the price or value" of the lambs. It was argued for the respondent that the value involved in the action must be taken to be £10, and that therefore an appeal was incompetent. But the Court held that as there was a conclusion *ad factum præstandum*, there must be something distinct and definite to oust their jurisdiction or induce them to decline dealing with it. They had no means of knowing that the value might not exceed £25. "A conclusion *ad factum præstandum*," said Lord Benholme, "cannot be measured by money. Besides, the alternative conclusion is not confined to the special sum of £10, but asks such other sum as may be ascertained to be the value of the lambs. What that amount may be we do not know." The case seems to have been disposed of without much difficulty, and the decision was unanimous. But shortly afterwards a very similar case came before the First Division from the Sheriff Court of Aberdeen. It was a petition seeking delivery of a number of fleeces, or, failing delivery, payment of £20, reserving a claim for damages, "or such other sum as shall be ascertained to be the price or value thereof." The Court considered the point to be one of such general importance that it should be brought before the whole Court. This was accordingly done, and only by a narrow majority was the competency of the appeal sustained. Lord Ben-

holme was one of the minority, having come to be of the opinion that the previous case had been erroneously decided. The majority of the judges took the view that in such a case as this the primary conclusion is *ad factum præstandum,* and that had there been no appearance for the defender, decree to that effect could have been obtained by the pursuer. If delivery was impossible, then the pursuer would seek his money under the alternative conclusion; but if he could prove in the course of the action a larger price or value than that stated in the petition he could recover it. The sum of £20 which was sought was to be viewed not as the maximum but the minimum sum to be recovered—a modified sum concluded for in the event of failure to deliver, without at the same time any opposition being offered. "The property may rise in value. A pursuer is entitled to recover such rise in the value of his property wrongfully withheld from him by the defender, and we think he may competently recover the same under such an indefinite conclusion as we find in the petition. Were this not the case great injustice might be done, because the amount recovered at the close of a long litigation might, owing to the rise in value of the property, be quite insufficient to enable the pursuer to replace it by purchase." These views receive very strong support from the authorities quoted, and which will be found at page 973 of the report. On the other hand, the minority were of opinion that the rule which admitted review in all actions having conclusions merely *ad factum præstandum* could not apply here, because the pecuniary value of his action had been measured and stated by the pursuer himself. They read the petition as containing a direct statement that £20 was the price or value of the fleeces, and by a decree in absence the petitioner could have got no more. The possible expenses of the action in the event of opposition could not be taken into account in estimating its value, and the claim for damage was reserved. Lords Ormidale and Gifford were with hesitation disposed to think that "where in a simple petitory action a specific sum is demanded, the addition of the words, 'or such other sum,' or even of the words, 'or such other sum more or less, as may be ascertained,' will not entitle the pursuer to recover more than the specific sum demanded." Lord Kinloch, apparently without hesitation, held the alternative expressed in such words incompetent: "If there had been no conclusion *ad factum præstandum* in the present case, but a mere conclusion for the value of the fleeces, as in a case where restitution was impracticable, I conceive that the alternative conclusion would have been clearly incompetent. But I do not think the case raised in principle by the conclusion *ad factum præstandum* being prefixed." It humbly appears to us that the argument of the minority is stronger than that of the majority. The pursuer must be assumed to have known the value of his own property; he was not entitled to go into court in order to have the value ascertained, and probably had no such intention. His claim for damages was reserved, and all that

he sought in name of money here was a sum under £25. But, on the other hand, the authorities founded upon by the majority seem clearly to establish that the Court have not been in the habit of looking upon the sum stated as the maximum, if the statement be so worded as to indicate that an indefinite sum is sought. Lords Ormidale and Gifford felt the difficulty arising from the course of previous decisions, and entirely avoided it. The Lord President indeed says that with the exception of the case of Shotts the authorities are all the other way, but he quotes none.

In concluding this branch of our subject the case of *Stevens, Son, & Co.* v. *Grant* (Oct. 17, 1877, 5 Ret. 19) must be noticed. In that case the summons concluded for £20, 5s. 6d., being the balance due to the pursuers by the defender as their commission agent, conform to an account annexed to the summons. In the account the defender was debited with goods, and the balance sued for was then brought out by crediting him with certain sales and a sum in name of commission, amounting to £7. The pursuers having lost their case in the Sheriff Court appealed to the Court of Session. In support of the competency of the appeal they relied upon the case of *Inglis* v. *Smith* (May 17, 1859, 21 D. 822). But the Court held the appeal incompetent. The following remarks of Lord Ormidale seem fairly to state the distinction which can be made between the two cases. Speaking of *Inglis* v. *Smith*, he says: "There a debt or balance of £92 odds was claimed as due to the pursuer on the particular transaction in question, and that balance was reduced so far by crediting, or rather setting off against it, a counter-claim due to the defender of £57 odds, and restricting the balance to £25. But it is obvious that the claim of the pursuer, standing as it did independent of the counter-claim, greatly exceeded £25, so that by concluding and taking decree for the balance, after making allowance for the counter-claim of £57, he proceeded on the assumption that he had a good claim of his own for the balance sued for, plus the £57. In that case, therefore, the value of the cause to the pursuer was truly the balance he took decree for, plus the £57. But here the commission was an item in the accounting before any balance could be ascertained, or, to put it differently, the pursuer could have no claim, and no debt could arise in their favour without crediting that commission." In deciding the case of Inglis the Lord Justice-Clerk (Hope), commenting upon the words of the statute, "any cause not exceeding the value of £25 sterling," observed that the true point to be considered was, What is the interest which the parties have in the cause? in other words, What difference will it make to them how the cause is decided? And as the pursuer in that case at once, by his decree, extinguished the debt due to him, and got a balance decerned for in his favour, his Lordship had no difficulty in holding that the value of the cause was above £25. But surely the distinction between that case and *Stevens, Son, & Co.* is, if sound, of the narrowest description. The latter had also a counter-claim in the shape of the defender's

commission to dispose of. A decision in their favour extinguished that claim, and brought out a balance of £20. Was not the total value of the action to them £20, plus £7, the amount of commission?

Objections to the competency of an appeal may be founded upon the nature of the interlocutor appealed against. The interlocutors which may be reviewed are set forth in section 24 of the Sheriff Court Act of 1853, which is to be read along with sections 53 and 54 of the Court of Session Act of 1868. The objection may be that the judgment appealed against is not final and exhaustive. The Court are strict in refusing to look at an appeal where the Sheriff has pronounced no finding as to expenses (*Russel* v. *Allan*, Oct. 18, 1877, 5 Ret. 22). But upon this point we may quote these words of the Lord President in the case of *Malcolm* v. *Macintyre* (Oct. 19, 1877, 5 Ret. 22): "The competency of an appeal is not to be determined strictly and absolutely by consideration of the question whether the conclusions of the summons have been disposed of and exhausted." In that case there was a petition presented in the Sheriff Court of Argyle for the purpose of having a march dyke erected under the authority of the old Scottish Acts. It was opposed, but the defences were repelled and the authority craved given, the interlocutor directing an account of the expense of erection to be given in when the work was completed. It was urged in opposition to the competency of the appeal that the interlocutor was not final, the order on the respondent to make payment of his share of the expense of building not being disposed of. The Court saw how unreasonable it would be to sustain such an objection, and accordingly, taking a fair and equitable view of the statutes, they rejected it. The Lord President said: "The question is, whether this interlocutor disposes of the whole subject-matter of the cause though judgment has not been pronounced on all the questions of law and fact. Now it is to be observed that the interlocutor repels the whole defences. That is a great step towards disposing of the whole subject-matter or whole merits of the cause. It is not easy to see what remains after the defender has been put to silence for ever. Therefore the dispute between the parties is at an end. It has been decided that the march dyke is to be built at the mutual expense of the parties. All that remains is merely executorial, namely, first, to build the dyke; secondly, to ascertain the cost; and thirdly, to apportion the cost. But when the first of these things is done there can be no longer any *lis pendens*." And Lord Deas remarked: "I am clearly of opinion that there may be many cases in which the whole merits of the cause have been disposed of, although there remains a good deal of procedure to be followed out and expense to be incurred before a decree can be pronounced making the previous finding fully operative."

In the case of *Shirra* v. *Robertson* (June 7, 1873, 11 Macph. 660) the Sheriff-Substitute had repelled certain defences as irrelevant,

and decerned in favour of the pursuer; the Sheriff recalled, and allowed a proof before answer of certain allegations by writ or oath of pursuer. The pursuer appealed, but the appeal was refused on the ground that the interlocutor appealed against was not final. This decision the Court gave with admitted reluctance. Difficulties have been felt in the case of actions of multiplepoindings. As the Lord President observed in the case of *Gordon* v. *Graham* (June 26, 1874, 1 Ret. 1081), "It is plain that under the 53rd section of the Court of Session Act 'the whole cause' may be decided more than once in an action of multiplepoinding. Because the whole cause between two competing parties may be decided, while all questions between the other competing parties remain open. In fact there may be as many whole causes as there are competitors, or rather pairs of competitors. It is therefore plain that in a process of multiplepoinding there may be more than one interlocutor disposing of the whole cause within the meaning of the 53rd section of the Court of Session Act." An interlocutor disposing of the whole cause, in so far as the raiser was concerned, by finding him liable in once and single payment, and ascertaining the amount of the fund *in medio*, would, it is thought, be an interlocutor upon which an appeal could be taken. (See *North British Railway Co.* v. *Gledden*, June 26, 1872, 10 Macph. 870.) But the case of Gordon establishes that when the inferior judge has merely decided the competency of the action by finding the existence of double distress, without determining the amount of the fund *in medio*, no appeal lies.

What is an interlocutor "giving interim decree for payment"? In the case of *Baird* v. *Glendinning* (Oct. 16, 1874, 2 Ret. 25) it was held that when the Sheriff granted warrant to a judicial manager to pay certain funds to a litigant, an appeal against this warrant lay on the ground that it was equivalent to an interim decree for payment. "In strict construction," said the Lord President, "there can be no doubt that it does not fall under the section of the Act. But the question comes to be, whether under an interim decree an interim warrant is included. I think that it is within the policy and also the fair meaning of the statute. This is the proper, and indeed the only, form to effect a payment of money, when the money is in the hands of an officer of Court." And Lord Deas, although not prepared to lay down that every warrant for payment of money is an appealable interlocutor, concurred.

An appeal is competent where sisting process is the effect of an interlocutor pronounced. Thus where a Sheriff recalled the interlocutor of his Substitute *in hoc statu*, holding that the case had fallen asleep, and must be awakened before any step could be taken in it, the Court of Session considered this to be virtually a judgment sisting process, and sustained the competency of an appeal against it.

Parties may by their actings in the inferior Court affect their right of appeal. Thus where the Sheriff has been virtually consti-

tuted an arbiter there is no appeal. This was held to have been done in the case of *Dykes* v. *Merry & Cuninghame* (March 4, 1869, 7 Macph. 603), where, upon an appeal from the Sheriff-Substitute to the Sheriff in a civil complaint under the Summary Procedure Act, parties had agreed that jottings of the evidence made by the Sheriff-Substitute should be used by the Sheriff as full evidence in the cause. "They thereby," said Lord Neaves, "gave to the Sheriff a consensual jurisdiction, which is another word for arbitration. The basis on which the Sheriff was authorized to decide was altogether out of the form of process. We cannot review a judgment so pronounced, and are neither bound nor called to become arbiters." Where in the Sheriff Court both parties had renounced probation one of them was not allowed to lead evidence in the Court of Session (*Picken* v. *Arundale & Co.*, July 18, 1872, 10 Macph. 987). As the Lord President said, "They entered into a contract to renounce probation, then they come here, and one of the parties to that contract asks to be relieved from it, and to be allowed to lead proof. I am for refusing to allow further evidence." But the decisions certainly illustrate the desire of the Court to take every step for bringing the merits of the case fully before them on appeal. Where a party had declined to lead proof in the Sheriff Court because he held the judge to have an *animus* against him, the Court of Session, after repelling his ground of declinature, allowed him to lead proof before answer (*Duke of Athole* v. *Robertson*, Dec. 15, 1869, 8 Macph. 299). After the appeal has been taken new averments and pleas have been admitted upon payment of expenses (*Gibson* v. *Smith*, Jan. 29, 1870, 8 Macph. 445, and *Keith* v. *Outram*, June 27, 1877, 4 Ret. 958).

In conclusion, two points relating to a special class of appeals, viz. those under the Debts Recovery Act, may be noticed. The case of *Cumming* v. *Spencer* (Nov. 21, 1868, 7 Macph. 156) establishes that if notes of the evidence are not taken in the Sheriff Court, parties cannot avail themselves of the 12th section of the Act, and have additional evidence afterwards taken by order of the Court of Session. "Whenever parties go on without asking to have a note of the evidence taken, they leave themselves entirely in the hands of the Sheriff, not only as regards the facts and import of the evidence, but as regards the admission or rejection of evidence," *per* Lord President. Again, where an objection that the value of the cause exceeded £50 arose on the defence, but was not taken in the Sheriff Court, it was held too late to urge it upon appeal (*M'Kendrick* v. *Robertson*, Dec. 14, 1870, 9 Macph. 283).

THE RIGHT OF COMMONTY.

In the course of the last few years no one can have failed to notice how much interest has arisen with regard to common lands in England. A good many instances have been adduced of attempts,

sometimes more or less successful, by private owners to encroach on or annex portions of adjoining common, and the resistance of the public to these attempts has led to both civil and criminal proceedings in various courts of law. The cause of the public is taken up by some energetic person, presumably on most unselfish and liberal grounds, and all sorts of questions have been raised. No doubt these guardians of the welfare of others rather than of their own do yeoman service in many ways; and at least they check the undoubted tendency to encroachment, while often also making the rights of parties clearer.

All these free fights and open riots, all these proceedings in the civil courts and so forth, do not increase respect for the manner in which the Legislature has in England attended to this branch of the law of real property. No doubt the commons of English counties are of far greater extent, and probably of immeasurably greater value, than our commonties in Scotland ever were; but that only renders it more surprising that statute there should not have interposed as it has done here, and enabled each person who has an interest in the common property to make application to the Court and obtain a judicial decision. The difference between the law of the two countries in this matter is interesting, for whereas in England they require a special Act of Parliament every time a decision takes place, we have an old Act dating back to the end of the seventeenth century to put all such decisions on one common basis.

Looking into this Act, the 38th of the first Parliament of William III., and passed upon July 17, 1695, we find evidence that in those times difficulties had been felt as to commonties, for the Act is declared to be passed "for preventing the discords that arise about commonties, and for the more easie and expedit decision thereof in time coming." An exception is made as to royal possessions and as to the burgage estate of royal burghs; but save for that any person who has any interest is permitted to raise a summons of decision against all concerned before the Court of Session, thereby made the determinators of all rights involved. As regards mosses there is a difference, for the Act proceeds, "And where mosses shall happen to be in the said commonties, with power to the said lords to divide the said mosses amongst the several parties having interest therein, in manner foresaid; or in case it be instructed to the said lords that the said mosses cannot be conveniently divided, His Majesty, with consent foresaid, statutes and declares that the said mosses shall remain common, with free ish and entry thereto, whether divided or not." The Act concludes with a further declaration as to the rights of those interested in the adjoining lands, which it says are to share in proportion to their value, and the common is to be so parcelled out that each portion of it as divided shall fall to the contiguous estate.

In one short Act, occupying not much more than half a page of the last volume of "Scots Acts," we have contained a valu-

able chapter in the history of our law. Modern refinement of legislation has introduced verbiage and redundancy to our statute book in no mean measure, but it would be well for all who laboriously compile those vast riddles now termed "Acts of Parliament," were they more attentively to study and to imitate the concise, clear, and pointed language of our forefathers. It is not, however, merely in its short and simple character that the advantages of this Act have shown themselves, for this very brevity and simplicity has made it more difficult to raise doubts and create questions of interpretation. The number of the reported cases as to commonties is really in all very limited, and we shall be able to refer briefly to the most important among them without occupying any great amount of space. Bell in his Principles (sec. 1088) points out certain differences between this and various other rights bearing some degree of resemblance to it. He says that it may be distinguished "from usufruct, as being not personal, but an accessory of the real property of the commoner; from liferent, as being perpetual, and without any reversionary right of fee in another; and from servitude, as being not a burden, but of the nature of limited property." We may paraphrase these remarks in observing that there cannot be commonty rights without heritable estate, on a possession of which they are founded, and from which they cannot by any means be disjoined, and that the rights of a commoner are indeed more nearly those of one of several *pro indiviso* owners, under limitations as regards their exercise in relation to the co-proprietors, not, as with servitude rights, privileges, forming a burden over what belongs in absolute property to another, but the enjoyment and ownership of property subject to limitation in the proprietary rights. This latter distinction is extremely well illustrated by the case of *Earl of Fife's Trustees* v. *Cumming* (Jan. 25, 1831, 9 S. 336), where a question arose between two proprietors of lands adjoining as to a muir, and it was decided that the one having the real right of property under an old decree, no amount of possession by the other consistent with his right of servitude could confer upon him a prescriptive right of common property. Again, in a much more recent case, *Mackintosh and others* v. *Moir* (Feb. 28, 1871, 9 Macph. 574), a question had arisen as to a right of way across a piece of unenclosed ground; and in giving judgment as to setting aside the verdict as against evidence, and the granting of a new trial, which was done, several remarks were made by the judges of the First Division upon the distinction between rights of way and indiscriminate use of unenclosed land as a short cut from one point to another. "I have no doubt," says the Lord President, "that a road may be so acquired [*i.e.* by public use], but I think it must be in some definite and ascertained track that that right is acquired." Lord Ardmillan also says, "The mere exercise of what has been called, somewhat singularly, a *jus spatiandi*, where there is no *jus* in the matter, but a mere pleasure, can never give rise to a right of way. . . . They thought it

was common ground or crown ground, or ground that the public, not the proprietor, had an interest in, and so they thought that they had as good a right to part of it as to the rest. No exercise of such a privilege as that can give rise to any right. In order to make use of the foundation of a right of way it must be along a definite line, in the assertion of a definite right." The observations strongly enforce the distinction between a servitude and a right of commonty; the servitude must be the defined burden, while the commonty rights are inclusive save as to their equally clear limitations. Besides this there may be quite well servitudes forming burdens over commonties. Suppose, for example, an estate not immediately adjoining a common possessed the right to flood a certain portion of the commonty for the storage of water to supply a mill. In a division of the common the owner of that estate would not be entitled to share in the common, nor could he be compelled to exchange his right for a share therein. The right of common is in fact enjoyed under burden of any servitudes that may exist, and mere division of the common will not extinguish these.

The creation of commonty arises either *per expressum* in a grant, or by a grant of "parts and pertinents" with, as Mr. Bell puts it, "an explanatory possession of common pasturage." This he illustrates by many references, of which two of the most recent, both arising in a process of division of commonty, will perhaps suffice. In the case of *Bain and others* v. *The Provost and Magistrates of Wick* (March 4, 1834, 12 S. 522), titles, conveying an estate "with all and sundry mosses, etc., parts, pendicles, and pertinents," would, the Court intimated, have been sufficient to instruct a right of property in part of a common had there been the requisite acts of proprietorship. In the case of *Earl of Airlie* v. *Rattray* (March 11, 1835, 13 S. 691) there were titles in similar form, and "with the privilege of shieling," but without the explanatory possession they were held insufficient. It may also be mentioned here that in the Fife case already referred to the claim was founded on titles which bore to be "with parts and pertinents," but of course there the possession was not deemed to be explanatory, as it was of a servitude, not of a common right of pasturage.

In order to bring properly a process for the division of a common it will not be sufficient that the pursuer be either in the position of holding a servitude right, or even be the sole proprietor of the lands, even though by servitudes the use of the whole surface is exhausted. Such at least was the argument maintained successfully in the case of *Stewart* v. *his Feuars*, 1695, M. 2472, although that decision really only determined the question in the particular circumstances, as will be seen by a reference to the report.

It is unnecessary for us to go particularly into the rules by which a division of a common is governed, following, as they do, general principles of equity, but there is one regulation of some interest and importance to those having rights of commonty, and showing the peculiarity of these in comparison with other proprietary rights.

This matter has reference to those cases in which one of the commoners has improved some portion of the commonty. At first the rule as to such improvements was extremely stringent, for in the case of Kinloch (Jan. 14, 1814, F. C.) the unfortunate man had improved the border of the common next to his own property, and it was held that the land thus improved fell to be allotted to him at its improved value, thereby giving him only about one-twentieth of what he might otherwise have claimed. In the more recent decision, however, of *Innes* v. *Hepburn* (May 18, 1859, 21 D. 832) it was held that encroachments on the common would not be entitled to compensation, though where land so improved fell within the portion of common allotted to him Mr. Hepburn was allowed to get it at its unimproved value. With reference to these improvements the Lord Justice-Clerk observed that "to say that he made them in good faith may mean anything or nothing in such a case; he may have been in perfect good faith in supposing them to be for his own advantage, while they did no harm to any one else, and he may have done what he did quite openly; but if it means that he did it in the belief that he had a good legal title there is nothing to show that, or to suggest that he thought that he was anything else than one of several common proprietors. I am, therefore, of opinion that the division here must be conducted on the usual principle; and while it is proper that the ground next adjacent to his property should be allocated to each proprietor at its unimproved value, I think a proprietor is entitled to no additional consideration because he has made in various parts of the common what I can only call encroachments."

Observations fell from the judges in this case indicative of the slowly protracted method in which a process for the division of a commonty drags out its traditional career; and there was much satisfaction expressed at an agreement which had prevented numerous questions as to servitude holders being raised, an agreement, it was remarked, "so well conceived and successful that the process may probably be brought to an end in two years instead of living during the period to which processes of division of commonty usually exist, and perhaps furnishing bread to a generation of lawyers yet unborn."

As recently as 1869 a question arose in the locality of Kinross with reference to the valuation of the teinds of a commonty. It is reported under *Kerr* v. *Common Agent of Kinross* (March 20, 1869, 7 Macph. 748). The valuation of the teinds had, it appeared, preceded the division of the commonty, having been dated 1630. The objector could produce no earlier title than 1755, when the lands were described with an express right of pasturage in an adjoining common. The division of the common took place in 1692. In these circumstances the common agent maintained successfully that Mr. Kerr had failed to show that in 1630 the right of pasturage, or indeed any common right, was attached to the lands, and that accordingly the portion of common allocated in 1692 was not

included in the valuation. At the advising reference was made to other cases, especially that of *Plummer* v. *Common Agent in the Locality of Selkirk* (Dec. 11, 1867, 6 Macph. 128), and it was pointed out that the heritor's case was favourable (1) where the titles constantly contained references to such interests as those attaching to commonty, or especially where there was specific allusion to some particular commonty; (2) where there is vicarage teind which alone, if valued, a commonty would produce.

DELIVERY OF DEEDS.

It is usually said that a deed does not bind the granter until the deed, that is, the parchment or paper duly executed, has been delivered. This delivery, or transference from one hand to another, seems at first sight to be a simple enough notion; but on examination of the leading cases it will be found to involve elements of great difficulty. Adopting the language of mathematics, we might say that the purposes of the deed and the character of the person to whom it is delivered are two independent variables; and therefore that a very large number of combinations may be expected. But at present we shall confine our attention to the case of infeftment or registration following upon a deed; and we shall endeavour to ascertain the state of the law upon this question, whether under all circumstances infeftment or registration in favour of the grantee is equivalent to delivery of the deed. As might be expected, it is not between contractors for valuable consideration that this question has arisen. Where A. holds an obligation from B. to deliver a deed, the fact of delivery is less important, for delivery can be enforced, and it is after delivery has been obtained that registration takes place at the instance of the grantee. The effect of delivering a disposition on sale is simply this, that it substitutes a personal fee for an obligation to convey. But in gratuitous deeds, especially those by parents in favour of children, the delivery of a deed is often the critical point in the creation of an irrevocable right. The history of the law on this subject seems well worth stating.

We shall begin with a case which illustrates by conversion the importance of delivery. In *Hindrich* v. *Dickson* (Dec. 5, 1627, 1 Br. Supp. 238) a husband, *stante matrimonio*, subscribed a charter to his wife of certain lands, but gave no infeftment *stante vita*. After his decease the widow intromitted with her husband's writs, and found the charter among the rest. On being charged by the heir-at-law to deliver the house and place, she alleged that she should bruik by reason of the charter. The Court, however, sustained the reply of the heir, that the charter was never delivered, nor any sasine given upon it. Had it been possible to look on the charter as a *mortis causa* deed, it would of course have received

effect; but it was clearly intended to take present effect, if any, and therefore the non-delivery was fatal. The next important case is that of *Bruce* v. *Bruce* (June 22, 1675), which is cited by Erskine, Bell, Duff, and Dickson as the leading authority for the proposition that the insertion of a deed in a public register is equivalent to delivery. Bruce had been infeft on a bond of annual rent granted by his uncle. The annual rent was to run from the uncle's death, and the deed was found in his repositories. The Lords found that though the deed had not been delivered, it was effectual, "there being a sasine registrate." At the same time they explained that if there had been a positive deed done by the uncle alleged in the contrary they would consider the same. In 1776 occurred the case of *Leckie* v. *Leckies* (M. 11581, and Presumption App. No. 1). Here Leckie executed a deed of settlement of a heritable subject in favour of his youngest daughter and her husband in liferent, and their son in fee, reserving his liferent; and also of the moveables of which he should die possessed. This deed was put on record. On the granter's death a competition arose between the grantees of the settlement and three elder daughters of the granter, in whose favour he had executed a disposition of later date. These ladies pleaded: "It can have no effect on this case that this deed was put into the register shortly after its date. If it was in its own nature liable to revocation, its being registrated *for preservation merely* could not alter its nature. This is not changed even by the formal delivery of a settlement in itself revocable. Registration is a slender as well as an equivocal act, and in all cases in which a deed appears in itself to be truly testamentary is interpreted in favour of the testator" (Bank. i. 9, 48). Notwithstanding this argument the Lords found that while the first deed could operate no transference of the moveables until the granter's death, and was to that extent revoked by the subsequent settlement, yet, as regards the heritage, that the registration was equivalent to a public delivery, and could be set aside only on proof of fraudulent registration. The next leading case upon our list is *Macintosh* v. *Macintosh* (28th Jan. 1812, F. C.). Macintosh purchased a house and took the disposition in favour of himself and wife in liferent and his daughter *nominatim* in fee. Infeftment was taken in the usual terms: "liferent state and sasine," and "heritable state and sasine." The father, after a second marriage, attempted to sell the house, but this was interdicted by the Court. Lord Meadowbank in delivering judgment, after pointing out the distinction between the case and that of Newlands, where the gift was to a parent in liferent and children unborn in fee, said: "Was there ever a doubt that the fee goes where it is desired to go, where the granter expressly gives it, and the grantee is capable of holding it? . . . If, indeed, the defender had kept this disposition in his own hands, and given it back to the seller, or destroyed it, and taken a new one in another form, we would have held differently, we should have held in that case that it was only an intended

fee. But when a man expedes an infeftment, he has no more right over the grant." This effect of registration is again alluded to by Lord President Hope in the case of *Balvaird* v. *Latimer* (Dec. 5, 1816, F. C.), where a disposition of a house had been taken by the testator in name of a cousin, but there was no delivery or infeftment. The competition arose with the widow as general disponee. We may notice in passing the singular relic of genuine feudal law embalmed in the opinion of Lord Balgray. "It is impossible," he says, "to hold that old Balvaird had the power of disposing of these subjects, for there was no feudal title in him. It has never yet been known that a person having neither a personal nor heritable right to property could make it the subject of conveyance." The principles established by the foregoing cases are not in the least infringed upon by the decision in *Sommerville* v. *Sommerville* (May 18, 1819, F. C.). Lord Pitmilly's decree in that case is probably the best statement we possess of the law of Scotland relating to the effect of delivery on an obviously *mortis causa* deed. There was an undated docquet on the deed which bore that the granter had now delivered it to his daughter, but there was neither recording nor infeftment. A strong effort was made to distinguish between the conveyance of a particular heritable subject as *inter vivos* and *de præsenti* and the general conveyance of property belonging to the disponer at his death. But this was rejected, and the Court found that the whole deed was revocable. We transcribe the essential portion of Lord Pitmilly's decree, as it has become a classical passage in the law of Scotland. "In respect the general disposition executed by the late Mr. Sommerville in November 1805 proceeds on the narrative of the granter having resolved to execute a settlement of his affairs, and after conveying in general all heritable and movable property which should belong to him at the time of his death, dispones in particular, without prejudice to the foresaid generality, the lands of Ampherlaw: Finds that the conveyance of these lands was thus expressly qualified, and in the same manner as the general conveyance of the disponer's property, heritable and moveable, was qualified, with the condition that the lands and other property disponed was only such as should belong to the disponer at the time of his death; and that it therefore remained in his power equally, as it did with regard to the rest of his property, heritable and moveable, to dispose of the lands of Ampherlaw, onerously or gratuitously, during his lifetime: Finds that the delivery of the deed did not alter the nature of it in the particulars referred to, or deprive the disponer of the power of disponing the lands in question any more than it deprived him of the power of conveying any other part of the property mentioned in the disposition of 1805: Finds that neither can the reservation of the granter's liferent of the estate of Ampherlaw, contained in the disposition, though such reservation was in consequence of the previous clause superfluous, alter the nature of the deed, or render the import and effect of it the same

as if the previous clause, qualifying the conveyance of the land, had been omitted, and as if the lands had been simply disponed under reservation of the granter's liferent," etc.

The converse result is well illustrated by the cases of *Turnbull* v. *Tawse* (April 15, 1825, 1 W. and S. 80) and *Smitton* v. *Tod* (December 12, 1839, 2 D. 225). In the first, a mother conveyed certain property in trust to pay specified debts, an annuity to herself, and the residue to her children *nominatim*. The trustees took infeftment on this deed, and were in course of paying the debts when, finding her liabilities larger than had been supposed, the truster executed a second trust-deed authorizing the payment of a larger debt. It was held, by the House of Lords reversing the judgment of the Court of Session, that she had no power to make the second deed. The decision is that of *Macintosh* v. *Macintosh* applied to the case of a trust in place of a direct disponee. Lord Gifford states it as "a question of construction, depending on the different clauses of the deed, and principally on the considerations which led to its execution, and the chief object which the granter had in view," how far he is to be considered as divested of his property. There might be a declaration *totidem verbis* in the deed, or its structure might indicate an intention to make an irrevocable settlement. Infeftment or registration was not conclusive.

In *Smitton* v. *Tod* (Dec. 12, 1839, 2 D. 225), Smitton some time after his marriage, and having then a family, conveyed the whole property he then possessed to trustees. The conveyance recited that he had made no settlement before marriage, or any other provision for his family, and that he was from facility unable properly to manage his affairs. The conveyance was declared to have immediate effect. The trustees were to enter immediately into possession, and the first purpose was to collect and to pay debts. For this purpose general powers of sale and burdening were given. The trustees were directed to pay to Smitton and his wife annuities, from which the right of Smitton's creditors was excluded in the usual way. On the death of the longest liver the residue of the estate was to be divided among the children. The trustees were infeft and entered into possession. The debts were partly paid when Smitton came forward, alleging himself to be now *rei suæ providus*, offering to secure the debts so far as unpaid, and asking the Court to find that he was entitled to revoke the trust-deed as a *mortis causa* deed, under which his children took a mere *spes successionis*. The trustees pleaded that they were bound to protect the interests given to wife and children. Their argument was mainly founded on the cases of *Braidwood* (26th Nov. 1835), and *Dalgleish and Short* (Mor. 6124). In *Braidwood*, a father on the usual narrative of love and favour disponed his whole estate irredeemably to his only surviving son by name, and his heirs and assignees. The disposition was subject to the payment of debts by the disponee (these were to be paid as soon as possible), and also

to certain money payments to the granter's daughters, payable after the death of the longest liver of himself and wife. Absolute warrandice was given, and the deed declared that the titles having been delivered to the disponee, the granter consented to registration in the books of Council and Session. In exchange for this the disponee had granted a separate obligation for annuities to his father and mother. The son was infeft and entered to possession, and paid a large sum of debt. The father made an attempt to revoke the deed, which he further averred to have been obtained by his representation. But the Court, affirming Lord Cockburn's judgment, decided in favour of the son, distinguishing the case from *Sommerville* (18th May 1819) and *Miller* (4 Sh. 822), where the deeds conveyed the estate belonging to the granter at his death, and likening it to *Curdy* (Mor. 15946) and *Duguid* (9 Sh. 844), where, as in *Braidwood,* the onerous obligations undertaken by the disponee were held to extinguish the power of revocation. Here, therefore, the element of delivery became less important. The cases quoted by Smitton's trustees from the Dictionary relate rather to the law of reasonable provision by husband to wife, although they also illustrate the effect of infeftment on a conveyance by a third party to father and children. The Court in Smitton's case followed *Turnbull* v. *Tawse* as a precedent, and found that the deed was irrevocable. Lord Cockburn said: "Neither the delivery of the deed, nor the possession by the trustees, nor the absence of any expressed power of revocation, nor the clause of warrandice determines this case. If the deed was by law revocable, these things cannot alter its nature. They all took place subject to its inherent qualities, but the Lord Ordinary's opinion that it is irrevocable rests on its own terms. He thinks that looking at its whole words, structure, and object, and gathering the pursuer's intention from what he has said, the deed is not subject to be recalled at pleasure." He then points out that though the deed is a voluntary one by a father in favour of his children, yet it is a post-nuptial provision, and that some of the trust purposes come into operation during the father's life. "The Lord Ordinary is not aware of any precedent or of any principle on which it can be held that a father who chooses to fulfil his natural obligation of providing for his children by a post-nuptial contract, whereby he puts a subject into the hands of trustees for their behoof, with power to them to apply it, both during his life and after his death, can at pleasure defeat the arrangement, which is onerous so far as the children are concerned. Their not being named is immaterial. Here they were born." Almost the same question arose in the case of *Wright* v. *Harley* (9 D. 1151). The conveyance was by an improvident father of his whole present and future estate to trustees to pay debts, to maintain the truster, and to provide a fund for the maintenance of his wife and children during the truster's life and afterwards. Part of this estate was described as a life-interest in the income of another

trust-estate, which was not thereby declared alimentary. The deed was recorded in the books of a Sheriff Court, it was advertised in the county paper, and the trustees paid debts and made considerable advances to the truster's family. An arrestment was then used in the hands of the trustee by a creditor of the truster, who claimed the amount of the annual payment accruing under the life-interest. It was held by Lord Wood and the First Division (Lord Fullerton dissenting) that the deed was bad against creditors, so far as regarded the benefits taken by the truster himself, but that it was good and preferable to the arrestment so far as regarded the provisions made in it for his wife and children. The judgment proceeds to some extent on the principle of reasonable provision by a solvent person, and is based by the judges on the cases of *Smitton* and *Morrice* v. *Sprott* (Jan. 23, 1846). The effect of a conveyance in general terms, and not of a specific fund, was reserved. Lord Fullerton was of opinion that the truster was not divested, but retained the power of testing on his property. It is not explained in the report how it was proposed to separate the interests of the different members of the family.

The value of infeftment or registration for publication is very apparent where the interests of creditors supervene. It is a general notice to third parties. The same principle appears in those cases which have been decided on the fact of communication between members of the same family. Of this kind is *Spence* v. *Ross* (5 Sh. 17), where a father, having sold some land, took an obligation from the purchaser to grant a bond for the price to himself in liferent and his sons in fee. He then asked his sons to subscribe a postscript to the missives agreeing not to call up the price for a term of years. The purchaser obtained possession, but neither bond nor disposition was executed. One son died, and the trustee on the estate of the other claimed for his creditors one-half of the price. The father disputed this claim on the ground that the deeds had never been delivered or put on record, and that every gratuitous provision was revocable. Lord Mackenzie, however, with whom the Second Division agreed, sustained the claim of the sons. He said that he considered "the communication to the sons as of the strongest kind; for it not only made them acquainted with the conveyance in favour of the father in liferent allenarly and of them in fee, but it required an actual and present exercise by them of the right vested in them under that conveyance, which exercise did take place accordingly. This seems far stronger than putting a conveyance on record." And, indeed, it may be said, wherever delivery has not been performed as a solemnity, but where the fact is disputed and decided according to a view of facts and circumstances and the relationship of parties, it is so decided because the contents of the deed were made known to the grantee or some one representing him. It is only after delivery has been proved that one is entitled to suppose that it has been delivered for execution. This is illustrated in *Ramsay* v. *Maule* (4 W. and S. 73), where Lord Wynford gave effect

to the doctrine of Erskine and Stair, that "a deed put by the granter into the possession of one who was doer both for the granter and grantee, is presumed to have been given to that person for the behoof of the grantee." This case may be compared with *Downie* v. *M'Killop* (6 D. 180), where a question arose as to the revocation of a bond of provision, the delivery of which was disputed. The same person was said to act as agent for the granter and his trustees, and the decisive circumstance seems to have been the recording of the bond in the Books of Council and Session, although it was argued that this might merely be for preservation, and did not (as decided in *Leckie* v. *Leckie*) amount to delivery where only personal estate was conveyed, and that the recording could not in the case of a gratuitous deed be presumed to have been done for the purpose of execution.

In *Burnet* v. *Morrow* (2 Macph. 929) the question was discussed whether recording a deed in the Register of Sasines was in all cases equivalent to delivery. The facts there were that Burnet was directed by the holder of a bond to prepare an assignation in favour of Morrow. This he did, and also put it on record, without authority apparently from his client, and certainly without knowledge on the part of Morrow till about a year afterwards, when the latter petitioned for delivery of the assignation. The Court being satisfied that money had passed between the parties, ordered delivery to be made. But Lord Deas dissented on the ground that putting a deed on record did not prevent the granter from showing *quo animo* that was done. The recording did not bind the grantee, for it might be inconvenient and unprofitable for him to have the deed recorded; and as he had not accepted delivery, the grant was not concluded by the act of registration. The same judge in deciding *Rust* v. *Smith* (3 Macph. 382), where a gratuitous disposition but no infeftment was taken in the wife's name, pointed out that "if infeftment had passed, and been duly recorded, this would have published to the husband's creditors and the world that his possession of the subject was possession in right of his wife, and would have made it plain that the property was hers." And he distinguishes the case where the disposition is granted, not by the husband, but by a third party, because there "it is not left within the power of the husband and wife to alter the state of matters by merely destroying the deed."

Going beyond the principle of *Macintosh* v. *Macintosh* we have the modern case of *Gilpin* v. *Martin* (7 Macph. 807), where a father, on purchasing some land, took the disposition in his own name for behoof of three children named, reserving power to him during the minority of the children to charge the subject with loans for building purposes. In this case there was no infeftment, but the father took and kept possession for nearly thirty years. He executed a settlement inconsistent with the disposition, and this, although it was not seriously disputed that the purchase

had been made with his own funds, it was found that he was not entitled to do. The judges lay some stress on the fact that the title in favour of the daughters (although never feudalized) was allowed to remain so long as the title to the property, and suggested that if the father wished to establish his right to alter the title, he ought to have taken some legal proceeding for that purpose. Lastly, the effect of registration in Books of Council and Session was discussed at great length in *Tennent* v. *Tennent's Trustees* (7 Macph. 936), where the deed under discussion was a trust for behoof of the granter's nieces, an extract of which had been forwarded to one of the trustees along with the securities of an estate conveyed. In spite of the strongest declarations to the contrary by the truster in a subsequent settlement, the Court held that this trust was irrevocable. The Lord President, in commenting on the clause of consent to registration, says: "Now this clause, though very shortly expressed, means all that clauses of much greater length formerly meant, in virtue of a statute made to that effect. It means that the granter not only consents that the deed shall be registered in the Books of Council and Session, but it implies the appointment of a procurator, who is to act for the granter of the deed in obtaining such registration; and the deed, being so registered, is to have the effect of a registered deed, just as much as if the old long clause had been inserted. And so also with the consent to registration in the Register of Sasines. That is just as effectual as if there had been a precept of sasine in the old form on which an instrument of sasine might have passed." Lord Deas differed on the ground that the granter did not think that registration would have the effect of rendering his deed irrevocable; and that the object of such registration in any case was not publication, although the deed might be examined on the register, and copies or extracts might be given to any one paying a fee. But his Lordship observed that registration of a sasine, or recording a disposition in the Register of Sasines, would have been, at least in that case, conclusive evidence of delivery.

The result seems to be, that whenever a deed does not from its terms appear to be *mortis causa*, infeftment is conclusive, even where delivery itself might not be so. If the benefit under the grant is postponed in enjoyment till the granter's death, or if the granter reserves his liferent, these circumstances do not exclude this effect of infeftment. In trusts, if the purposes are to operate during the truster's life, and the trust is in favour of children not otherwise provided for, these circumstances tend to make infeftment conclusive, except as regards the rights of creditors against a reserved interest. *Leckie's* case suggests that the same effect may be attributed to registration for preservation, and that this may even exclude revocation of an admittedly *mortis causa* deed. But more recent views, which are illustrated in *Spalding's Trustees* and *Forrest* v. *Robertson*, rather treat registration of either kind

as an item of evidence showing intention to create irrevocable interests.

Reviews.

Manual of the Education Act for Scotland. Seventh Edition, revised and enlarged. Wm. Blackwood & Sons, Edinburgh, 1879.

MR. SELLAR has just published the seventh edition of this work, and, as having been legal secretary to the Lord Advocate at the time when the Education Act was passed, he may be presumed to have had special advantages in the preparation of such a manual as now lies before us. When any book within seven years of its first publication enters upon a seventh edition, it is not an unreasonable thing to suppose that either it has great originality and merit, or else that it contains information of interest and value to the community at large, or at least to some considerable section of it. Now this manual is not in any sense original, but we have in it a compilation of useful facts and observations, together with the statutes bearing upon a subject interesting to several rather numerous and certainly most important bodies of Scotsmen. To the members of School Boards all over Scotland this manual must continue to prove most valuable, because they will find narrated in a style sufficiently colloquial to be distinct all the judgments wherein their position, their rights, and their duties have been called in question. Schoolmasters, however, not less than School Boards, will consult with advantage Mr. Sellar's remarks and Mr. Smith's brief but clear abstract of the decisions.

Lastly, the volume will be useful to the members of the legal profession. To them it will afford a handy means of reference in advising upon any disputes that may hereafter arise, although we confess that the abstract of the decisions already referred to would have been for a technical person more complete had the reference to the volume of the reports, as well as the mere Division of the Court and the date of judgment, been given in naming each case.

The edition of the manual before us has been greatly enlarged, and the additions to the earlier editions contain much important matter. If we were disposed to cavil at the mode of arrangement, we might point out that the Appendix has now swelled out until it occupies 310 pages out of a total of 465, leaving but small space for the regular portion of the work; but, on the other hand, the Appendix embraces perhaps the most valuable among the additions, and not the least among these a revised edition of the address delivered at the Social Science Association at Aberdeen in 1877 by Lord Young, the author of the 1872 Act.

The whole volume is divided, exclusive of the Appendix, into five

parts, of which the first four are taken up with the text of the Acts of 1872 and 1878, together with summaries of each—a useful feature in the earlier editions now extended to the new statute. The fifth part is unique. It is the work of Mr. W. C. Smith, Advocate, and is termed "Decisions in the Court of Session and Sheriff Courts, with Extracts from Opinions of Counsel arranged in Reference to the Divisions of the Act of 1872." These authorities are brought down to date, and every credit is due to the compiler, but we must protest vigorously against the introduction of these "extracts from opinions of counsel." In the first place, they are only "extracts," and we do not know how they have been selected. Then, again, no opinion is worth much as an authority in the eyes of sensible men unless the facts are also known; and it is notorious that much, very much, depends upon the way in which these facts are stated in the memorial. Lastly, opinions of counsel vary in value according to the name appended to them, unlike a judgment of any Court.

The new Act of 1878 very properly receives a large share of attention, and the editor explains and annotates largely the important provisions of sections 5 to 15 as to the employment of children. We do not attempt to enter into any review of these regulations, but we cannot agree with Mr. Sellar that they are too stringent, for the exemptions appear amply sufficient to cover any cases of possible hardship. Sections 18, 19, and 20, it is pointed out, deal with a new and interesting branch of the finance of education, in giving powers to School Boards to pay from the school fund for the advancement of higher education. We believe the true principle in this enactment has been departed from, and it is to be feared that these payments are as it were but the outlying shoals of the most serious reef over which the educational bark has to sail. Still it is to be hoped that the means will yet be found to provide these funds from other sources than the general cess, and that such a regulation may yet be repealed. The Education Department are in fact giving up the reins of government too much to the School Boards in these matters, though we should be the last to advocate anything like an apron-string government for the local bodies.

There is one point to the decision of which the recent Act might have given much help, but which is passed over in silence; we refer to the contradictory judgments pronounced by seven Sheriffs on the liability of parish ministers for school rates (pp. 191, 192, 193). This is a matter of considerable moment, and the hope may be expressed that it will soon be dealt with by the Legislature. A similar divergence of opinion is observable in questions as to the right of appeal at School Board elections (pp. 165, 166).

In conclusion, we may call attention to a number of forms of complaint at the end of the Appendix. These appear admirably suited for the purpose for which they are intended, and are couched in simple though precise language. With these and a full index the

volume concludes, and it is to be hoped that it may find its way into the hands of those numerous readers to whom the suggestions and explanations may prove of real value. This consideration is of greater importance at the present time when the period for elections of new School Boards for Scotland is approaching, and when we remember that there will probably be many persons for the first time placed upon the educational directorate of the country to whom the forms, the regulations, and even to some degree the duties, of their new position will be strange.

The Law of Negligence. By ROBERT CAMPBELL, M.A., of Lincoln's Inn, Barrister-at-Law, Advocate of the Scottish Bar, and late Fellow of Trinity Hall, Cambridge. Second Edition. Stevens & Haynes, London. 1878.

MR. CAMPBELL has in this second edition to a considerable extent rewritten as well as amplified his treatise on the "Law of Negligence," which was published so lately as 1871. Even within this short period, however, a very large number of cases have been decided, bearing on important points in this branch of the law upon which Mr. Campbell comments in an interesting manner, and which he endeavours to reconcile with the leading principles which he enunciates and defends. In a subject which touches upon nearly every transaction into which a man may enter, and in which it is so difficult to fix a proper criterion from which responsibility may be inferred, it is not surprising that to some it has seemed that every case must be judged on a consideration of its own circumstances, and that it is almost impossible to lay down hard and fast lines for the determination of questions arising out of alleged negligence.

Mr. Campbell has made the attempt in this essay, as he modestly terms it, and though we do not agree with the division which he proposes, and for which he can cite the authority of Erskine and Sir William Jones, there is great ingenuity in the manner in which he has grouped under their different headings large classes of cases. The division of *culpa* which he follows is that which was formerly supposed to be taught in the Digest, viz. *culpa lata*, *culpa levis*, and *culpa levissima*. The opinion of recent students of Roman law is unanimous, or nearly unanimous, in holding that the Roman jurists only recognised a twofold division, and that *culpa levissima*, an expression which only occurs once in the Digest, was never used by them in opposition to *culpa levis*. It is indeed difficult to see how such a distinction could logically be made. *Culpa levis* implies the want of that care and that attention which a man essentially attentive and careful is wont to bestow on his affairs. It is manifest that this care may be of very different degrees in different circumstances. A careful man will take greater precautions in driving a carriage in a crowded thoroughfare than along a country road, but in each case he is held bound to give the amount of care which an attentive

and careful man would give in the circumstances. If damage happens after he has given this care it is an accident for which he may be responsible or not, but he cannot be said to be negligent. In short, *culpa levis* contains within itself an almost endless variety of degrees of want of care, but they all fall within the one rule we have indicated. The examples cited by Mr. Campbell as cases of *culpa levissima* go to establish this proposition, because they may be divided into two classes, viz. those which arise out of the want of reasonable care, *e.g.* the responsibility of a railway company for injury to a passenger through their failure to take reasonable care to ensure that the carriage in which he travelled was roadworthy; and those which are not cases of negligence at all, *e.g.* the responsibility of a common carrier who is liable for the safety of the goods intrusted to him under certain exceptions as an insurer. A common carrier cannot excuse himself for the failure to deliver safely by proving that there was no negligence on his part, but only by showing that the loss arose from *vis major*, or the act of God. The true division is into cases where a man derives no benefit from the act or contract, in which case, speaking generally, he is only liable for *culpa lata*, or gross neglect, and cases where he derives benefit, and is therefore liable for *culpa levis*, but of *culpa levis* the degree varies with each variety of circumstances.

This treatise will be of great use to the student of law in bringing before him, within short compass, the leading cases which have been decided on the law of negligence, and Mr. Campbell's criticisms and observations upon them will well repay, as they merit, an attentive consideration. In a future edition a great improvement would be the prefixing of an abstract of the contents, so as to show at a glance to the student the plan and relation of the parts.

Report of the Petition of William Muir and Others for Rectification of the List of Contributories of the City of Glasgow Bank. Edited by A. Taylor Innes, Esq., Advocate. Edinburgh Publishing Company.

We have received a report of what is generally known as the "Trustee Test Case," recently decided in the Court of Session, and by which trustees whose names were found on the register of the Bank were found personally liable as shareholders. The speeches of counsel and judges' opinions have been revised by the several gentlemen responsible for them, and an introductory narrative setting forth the facts of the case in a clear and concise manner has been added by the editor. Read along with the case of *Lumsden* v. *Buchanan*, in which, of course, the general principle is more fully discussed by the Bench, this case gives all the law on the subject down to date, and will no doubt be found of service to the profession, besides being of interest to those unfortunate persons who are more directly interested in the question.

Obituary.

Legal Obituary, 1878.—During the past year the following deaths have been recorded of members of the profession in Scotland :—

I. FACULTY OF ADVOCATES—13.

Name	Admitted	Name	Admitted
James Hozier	Admitted 1815	Robert Horn	Admitted 1834
Arthur Burnett	„ 1819	George Thomson	„ 1835
Sir W. Gibson-Craig	„ 1820	Robert W. Pohlman	„ 1839
John Cowan (Lord Cowan)	„ 1822	Gustavus B. Colin	„ 1843
Robert Grant	„ 1823	James T. Anderson	„ 1856
Allan Elliot Lockhart	„ 1824	James D. Dickson	„ 1873
Mark Stewart	„ 1827		

II. WRITERS TO THE SIGNET—15.

Name	Admitted	Name	Admitted
M. N. Macdonald Hume,	Admitted 1815	J. R. Polloxfen	Admitted 1836
D. S. Threshie	„ 1819	Andrew Murray	„ 1837
James Cnnningham	„ 1823	D. H. Gordon	„ 1837
Thomas E. MacRitchie	„ 1824	James C. Murray	„ 1848
Hugh Blair	„ 1827	George Burn	„ 1864
George L. Sinclair	„ 1827	Thomas Spalding	„ 1865
J. C. Reddie	„ 1829	Thomas Wilson	„ 1872
James Macknight	„ 1833		

III. SOLICITORS SUPREME COURTS—9.

Name	Admitted	Name	Admitted
John Ronald	Admitted 1826	W. P. Sprott	Admitted 1861
James Adam	„ 1828	George Begg	„ 1869
Peter Rae	„ 1833	David Speid	„ 1869
Ebenezer Mill	„ 1849	Æneas Mackenzie	„ 1873
A. Kelly Morison	„ 1851		

IV. WRITERS IN GLASGOW—10.

John Buchanan, LL.D.
John Hotson.
James Lockhart.
John B. Dunbar.
Andrew Orr.
John Pyle.
William Fleming.
Peter M'Intyre.
John W. Alston.
W. E. Simpson.

V. WRITERS IN THE PROVINCES—28.

Charles Stewart, Inverness.
Newell Burnett, Aberdeen.
John Angus, Aberdeen.
George D. Wallace, Fraserburgh.
John Grant, Tain.
William Maury, Perth.
John A. Swanston, Dundee.
Andrew M'Lean, Dundee.
David Bennet, Dundee.
Charles Will, Brechin.
G. B. Brand, Kirriemuir.
James Watson, Coupar-Angus.
David Dickson, Laurencekirk.
Robert Sconce, Sheriff-Substitute, Stirling.
Andrew Wilkie, Leven.
Alexander Macbeath, Dunfermline.
John K. Peebles, Airdrie.
David Semple, Paisley.
J. B. Barr, Paisley.
Alexander Hamilton, Kilmarnock.
James C. Robson, Dunse.
David Broomfield, Kelso.
William Gun, Dumfries.
James Lidderdale, Castle-Douglas.
William Shaw, Stranraer.
Thomas Lees, Musselburgh.
William Watson, Haddington.
A. Falconar, Sheriff-Substitute, Nairn.

DAVID SEMPLE, Esq., Solicitor, F.S.A.—In the death of the above gentleman, which took place at Paisley on the 23rd December, the profession loses an active and accomplished member, who was not only a good lawyer, but a cultivated gentleman, well versed on many matters which lay far outside of his own legal business. We take the following excellent notice of the deceased from a local paper:—

"Mr. Semple was born at Townhead, Paisley—within a hundred yards or so of the place of his decease—on the 21st August 1808, and exactly opposite the house where, three-and-twenty years before, Professor Wilson—the Christopher North of Blackwood—first saw the light. His father was one of the 'bien' feuars and merchants of the olden time, and gave his son an education worthy of his position. Attached to the principles of political progress, he was a sympathizer with the earliest efforts for Parliamentary reform; and from him, without doubt, were acquired the political leanings that through life characterized his son. His school curriculum completed, Mr. David Semple, while still a lad, was apprenticed to Peter Lawson and John Hart, writers in Paisley. His apprenticeship completed, he commenced business on his own account in 1828, and was in the same year admitted a Notary Public by Sir Walter Scott, then an advocate. In 1831 he joined the Faculty of Procurators. In the earlier portion of his career he was associated in partnership with the late Mr. Caldwell, and afterwards with the late Mr. Anderson, Procurator-Fiscal. For nearly the whole of his professional career, Mr. Semple acted as agent for the Liberal party, and took a deep interest in electioneering work, whether parliamentary or municipal. In this sphere of action his admirable system of method and arrangement were peculiarly valuable; and he habitually kept regular records of how each member of the constituency voted, that became of especial value when the chances of any prospective candidature had to be estimated. From 1842 to 1845 he was a member of the Town Council; and when, a year or two afterwards, the office of the Town-Clerkship became vacant, his friends considered his many qualifications fitted him admirably for the post. Mr. Semple, however, made no formal application for the office, and the appointment was bestowed otherwise. For the last thirty years he confined his professional attention almost entirely to his private business; his success, especially as a conveyancer, being of a marked character. His duties of secretary to the Paisley Heritable Property Investment Society for nearly twenty years were most honourably filled, and to his painstaking care and attention the prosperity of that flourishing institution is in some measure to be attributed. Mr. Semple was also a Cart Trustee, an Ecclesiastical Trustee of the Middle Parish Church, and a Director of the Paisley Cemetery Company. Since the late Parliamentary election, he has acted as agent for Colonel Holms; and, on his appointment, arranged the constituency—in the prospect of a contest—in so satisfactory a manner that, had it been required, the sentiments of the electors might have been easily ascertained in a day. Although a few years ago he assumed his sons as partners, he remained in harness to the last, and early in the present month was actively engaged in arranging for Mr. Holms' annual meeting with his constituents.

"It will, however, be principally as a local antiquary that Mr. Semple will be remembered. His activities in connection with business matters found their reward in the success of the moment, and the recollection of them passes away with the occasions that called them forth. With the investigations connected with questions of a more abiding interest, it is otherwise. These fall to be regarded as contributions to our common stock of information on points of historical or local importance, and are valuable for the future as well as for the present time. Mr. Semple's antiquarian works bear evidence of careful investigation and patient truth-seeking. Accuracy was the one point aimed at, and was patiently pursued, whether or not some poetical tradition was in the end

to give way. This sifting of evidence and establishing of facts was Mr. Semple's special aim, and he has frequently told us that his special work was not so much the framing of local history as the laying down of material for some one who would come after him to use in the compilation of the history of either town or county. One of the earlier compilations of Mr. Semple was 'The Poll-tax Rolls of Renfrewshire for the year 1695,' divided into the parishes or 'parochines' of the time. It appeared about sixteen years ago in the *Glasgow Herald*, week by week, until completed, and was no doubt preserved in many cases by collectors. Mr. Semple's own slips he bound up, and added a valuable MS. index, by which any name can be instantaneously turned up. About the same period he furnished to the *Paisley Herald* a series of interesting local papers on the 'Lairds of Glen,' which was separately published. To our own columns he was from the first a valued contributor; and the principal antiquarian papers, which in most cases have been reprinted in book form, were through his kindness given in the first place to our readers. 'The History of the Cross Steeple,' 1868; 'The History of the Town's House and Saracen's Head Inn,' 1870; 'Saint Mirin,' 1872, with supplements, 1873-1874; 'The Barons of the Barony of Renfrew,' 1876; 'The Tree of Crocston,' 1876, and supplement, 1878; 'Popular Errors in Crawfurd's and Semple's History of Renfrewshire,' 1878; 'The Abbey Bridge of Paisley,' 1878; and numerous other 'Local Memorabilia' worthy of consideration, should his antiquarian contributions ever be gathered together, appeared in our columns as they were written.

"Mr. Semple's principal contribution to general literature is the very excellent centenary edition of the works of Robert Tannahill, edited by him, and published by Mr. Alex. Gardner in 1876. The notes are quite a monument to Mr. Semple's industry and general intelligence, done, as his work was, in but a limited time. The poet's life, family, acquaintances, favourite localities, were all carefully studied, with the result of a large amount of information being gathered in, that in a few years, at most, would have been lost for ever. On entering on his labours, Mr. Semple assures us in his preface to the volume, he became zealous to furnish full notes, and of making his preparations a labour of love. Nor was he a moment too soon; for, in but a few months after, the severe winter of 1874 carried off a large number of aged persons whom he had seen, and from whom he had received much valuable information. All who knew Mr. Semple will readily believe that all the labour connected with this special work was to him a source of 'unmixed pleasure.'

"As the compiler of data for the future historian that he occasionally described himself to be, Mr. Semple has left 'cuttings' and manuscript notes illustrative of many branches of local history, arranged and bound up in volumes ready for reference. These embrace Political Pamphlets in connection with local elections, Olden Times in Paisley, Scrap-Book of Antiquities, School Board Proceedings, Abbey-close Improvement, Centenary of Tannahill, Local Meetings and Matters, Paisleyana, the Brodie Park, and others. One of the most curious of his compilations was that of every possible document connected with the erection of the Free Library and Museum, from its first projection till its completion, done up in a massive volume, bound in oaken boards made from the old Dundonald House that stood in High Street, and was reputedly the oldest house in Paisley. This volume he presented to the Library and Museum as a testimony of his admiration of the generosity of the founder of that valuable and popular institution.

"It may be mentioned, in passing, that the notes on the valuable collection of local photographs by Mr. Robert Russell, now of Glasgow, and which form so interesting a portion of the collections in the Museum, were all furnished by Mr. Semple. Each old house and county piel has had its history condensed, so as to give additional interest to the well-executed photograph which it accompanies.

"'The Harp of Renfrewshire,' another of the reprints of Mr. Gardner, was,

we understand, indebted to Mr. Semple for the Essay on the Poets of Renfrewshire prefixed to Series I., and also to not a few of the numerous notes in Series II.

"Mr. Semple's habits, as may be easily learned from the above enumeration of his multifarious labours, were of the most active kind. His life was one of continuous, unceasing exertion; his only relaxation being a quiet half week or two at some retired spot on the Firth. Last August, having completed his half century of business, he took a longer holiday term than usual, and spent a few weeks in the neighbourhood of Tarbert, on Loch Fyne. The season was a delightful one, and he returned to town thoroughly braced up and in the best of spirits. He had conducted his business for a period in itself most gratifying, had made arrangements for its effective continuance in the hands of his junior partners, and felt, as he himself expressed it, 'thoroughly independent.' Now, doubtless, many a pet department of research was to be carried out, and partially-completed investigations to be finished. His wiry, energetic temperament gave good evidence of his capacity for the work; and, had he been spared, not a few contributions might have from time to time been looked for. The end, however, was nearer than was expected, and, after but a few weeks of poorer health than usual, and but a few days' confinement to his room, he has passed away, quietly and serenely, in the midst of his family. He had barely entered on his 71st year, and leaves an affectionate widow and family to mourn his loss.

"Mr. Semple's energetic labours as agent for the Liberal party were acknowledged in 1839 by the presentation of a gold chronometer, recognising his 'long, devoted, and meritorious services in the Registration Courts.' The Antiquarian Society in 1873 bestowed upon Mr. Semple a Fellowship, as an expression of their admiration of his valuable and varied antiquarian and archæological acquirements."

JAMES CAMPBELL TAIT, Esq., W.S.—The death of this gentleman took place last month in the eighty-first year of his age. He was the son of Mr. Crawford Tait of Harvieston, and a brother of the present Archbishop of Canterbury. He was a kindly, simple-hearted gentleman of the old school, and for many years carried on business in Edinburgh, being the senior partner of the firm of Tait & Crichton, W.S. He was admitted a member of the Society of Writers to the Signet in 1823; with him is snapped another, and one of the very few remaining links which bind us to the recollections of old Edinburgh society as it was in its palmiest days, in the time of the literary giants of old.

JOHN MURRAY, Esq., S.S.C. (1836), died on the 23rd January.

The Month.

Faculty of Advocates.—The anniversary meeting of the Faculty was held on the 15th January. In accordance with time-honoured custom the Dean (Dr. Fraser) proceeded, previous to the meeting, to the various Courts, where, baton in hand, and with a large following of the Bar behind him, he asked the judges to suspend business for the remainder of the day. This was, as usual,

acceded to in every instance, except in the First Division, where the Lord President asked to be allowed to resume work after an hour's interval, owing to the press of business caused by the City of Glasgow Bank cases; his Lordship, however, distinctly stated that this course was not to be made a precedent for future occasions. The meeting was then held, and the various committees and office-bearers appointed for the ensuing year. At the close of the meeting it was unanimously resolved, on the motion of Mr. Kinnear, that it was necessary for the efficient discharge of business in the Court of Session to maintain the number of judges required by law, and that the delay in filling up the vacancy caused by the death of Lord Neaves could not be continued without interfering with the proper administration of justice, and thus proving injurious to the interests of the country and the usefulness of the Court. It was also agreed that a copy of this resolution should be sent to the Prime Minister, the Home Secretary, the Lord Justice-General, and the Lord Advocate.

Accommodation for the Bar in the High Court.—We think it only our duty to put on record a word of remonstrance to the Crown authorities on the very insufficient accommodation provided at the recent trial of the City of Glasgow Bank Directors in the High Court of Justiciary, for members of the Bar not engaged on the case. Only one bench in the body of the Court was allotted to them, and of the two small galleries to which advocates were supposed to have the right of entry, it can only be said that they were filled with everybody but barristers. No officer belonging to the Faculty was in charge of the Bar seat in the body of the Court, so that if any unfortunate presented himself without the paraphernalia of wig and gown, he was sure to be denied admittance. Of course we do not expect policemen to have the manners of gentlemen, but a little more of the *suaviter in modo* might, we think, with advantage be infused into the force, although we candidly admit that the task of keeping a door during a heavy trial must of itself be a heavy trial to the temper. Altogether, what with difficulty of access to the Court, and crowding while in it, the Bar had a hard time of it; the "other branch of the profession" had double the number of seats allotted to it, and they were not used to nearly so great an extent. We hope that the next time a *cause célèbre* comes before the High Court, the arrangements may be more perfect. In justice, however, a word of praise may be given to the ingenious way in which space was utilized inside the Bar so as to give some sort of accommodation at all events to the unwonted array of counsel engaged in the case.

Candlemas Recess.—The usual vacation will take place this month, the Court of Session rising on Saturday the 8th inst., and sitting again on Tuesday the 18th. The Teind Court will sit on

Monday the 17th, and Lord Ormidale will be the Bill Chamber Judge during the recess.

Appointments.—J. GORDON MAITLAND, Esq., Advocate (1873), has been appointed Procurator-Fiscal of Berwickshire.

CLEMENT W. R. GORDON, Esq., Solicitor, has been appointed Procurator-Fiscal of Banffshire.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF LANARKSHIRE.

Sheriff-Substitute SPENS.

BUCHANAN *v.* BUCHANAN.

Custody of child.—Jurisdiction of Sheriff Court.—The interlocutors in this case sufficiently explain the grounds of judgment; but it may be noted that the acquiescence in the interlocutor of 18th October 1878 chiefly was due to a voluntary deed of separation which was drawn up between the parties. The agent of the mother was satisfied that the father was the legal custodier of the child, although not prepared to admit the jurisdiction of the Sheriff Court in the matter, at least in the first instance.

"*Glasgow, 18th October* 1878.—Having heard parties' procurators and made avizandum, closes the record; finds that the action is competent in the Sheriff Court under reference to observations in note; and finds that the petitioner is entitled to the custody of his child, subject to the respondent's right of access to said child; and appoints the case to be enrolled on the debate roll of the 1st November next, in order that arrangements may be made to provide for the respondent's right of access to her child; but allows leave to appeal.

"WALTER C. SPENS.

"*Note.*—The question raised in this case seems to me one of great interest and importance.

"I cannot regard it as one merely of the *interim* custody of the child; for it seems to me directly to raise the question of the competency of the Sheriff Courts to deal with the permanent custody of the children of litigants residing within the limits of their respective jurisdictions.

"There are conflicting decisions in the Sheriff Court in regard to this matter, and in the last-reported Sheriff Court case on this subject I have seen, that of *Hood* v. *Hood*, to be afterwards adverted to, it was held by both the Sheriff Substitute and the Sheriff Principal of Aberdeenshire that the action was competent. It is true that there are various other Sheriff Court decisions to a contrary effect. I merely refer to *Hood* v. *Hood* as showing that the practice in the Sheriff Courts has not been uniform. In none of the cases, however, that have come under my observation does there seem to have been any analysis of the grounds upon which jurisdiction has been found to be excluded. I therefore propose to advert in order to the different grounds upon which it may be argued that the custody of children cannot be regulated in the Sheriff Court. Before, however, doing so I may refer, in the first place, to what is said by the Dean of Faculty on the subject (Fraser on Parent and Child, p. 81). The Court to which applications should in Scotland be made is the Court of Session, as the Supreme Court of equity of the county. The Sheriff has no power to deal with the matter of permanent custody, but in cases of emergency the Judge Ordinary of the bounds can on a summary petition regulate the interim custody of the children, a jurisdiction which is often asserted. The authorities, however, which are referred to under this head are simply the Sheriff Court decisions (which I have already said are conflicting). In the second place, I may advert to certain Court of Session decisions and

certain *dicta* of the Judges. In the case of *Lang* v. *Lang* (20th June 1849, 11 Dunlop, 1217), which was advocated from the Sheriff Court, and where the Sheriff had ordained the mother to deliver up the child to the father, the objection of incompetency was waived by the mother, and the Court adhered to the order pronounced by the Sheriff. In this case there was a waiver as to the competency, but as I have always understood a question of competency of jurisdiction is *pars curiæ* to determine, and in this case it seems to have been brought specially under notice of the Court, which nevertheless practically adhered to the Sheriff's interlocutor.

"In the recent case of *Hood* v. *Hood* (24th January 1877, 9 Macph. 449) the Lord President said: 'With reference to an application by a husband in the Sheriff Court for the custody of his children, this petition was presented while the husband was still in the country, and the question was raised whether the Sheriff had jurisdiction to obtain it. That is a question of some delicacy, but it is not necessary to give any opinion upon it.' Without, therefore, expressing any opinion as to whether the weight of authority of decided cases is for or against the Sheriff having jurisdiction, I desire to point out that the question is an open one before proceeding to deal with the arguments against the Sheriff Court being entitled to entertain this class of cases. (1.) The first of these is, that a question of this kind is of the nature of consistorial questions. Now it was by an Act of 1830 (11 Geo. IV. and 1 Will. IV. c. 69) that the consistorial jurisdiction of the Commissary Court of Edinburgh was transferred to the Court of Session by section 33, which enacted 'that all actions of declarator of marriage and of nullity of marriage, and all actions of declarator of legitimacy and of bastardy, and all actions of divorce, and all actions of separation *a mensa et thoro* shall be competent to be brought and insisted in only before the Court of Session.'

"The specified actions only, with the additions of actions of adherence and dèclarators of putting to silence only, are proper consistorial actions, and it is clear that the present *ad factum præstandum* action does not fall under any of the enumerated descriptions of cases. (2.) It may however be said that the Sheriff jurisdiction is excluded in respect a matter of status is involved. Mr. Mackay in his valuable work, recently issued, on 'the Practice of the Court of Session,' says 'that the Court of Session has exclusive jurisdiction in actions relating to rights of status,' which, as he points out, are still sometimes called consistorial actions, because prior to the Reformation they were proper to the consistorial courts. He further proceeds to say (p. 202), which, as it humbly appears to me, is a correct exposition of the law, 'The Sheriff may however entertain actions as to rights incident to or depending upon the rights of status where that right itself is not in question.' Now the status of petitioner and respondent as husband and wife is not in dispute, nor so far as affecting any question of law, having any relevancy in this case, is the status of the petitioner or respondent as individuals in question; for, as I will proceed further on to show, it is settled beyond dispute that allegations of cruel treatment to the mother by a father are not relevant to prevent his obtaining the custody of his children. I think it clear that if allegations were made *bona fide* of such immorality or other misconduct on the part of a father which the Court of Session has recognised as a bar to his being intrusted with the custody of his children, then such an inquiry as affecting the status of the individual could not, I think, competently be made in the Sheriff Court. Therefore, for that reason, if in a petition for the custody of children such averments were made, then I think the action would require to be dismissed upon this ground, subject, however, to the Sheriff's right to investigate into whether such averments were *bona fide* made or merely put forward with the object of defeating his jurisdiction. (3.) But it is said that the right to regulate the custody of children is inherent only to the Court of Session as the Supreme Court, in virtue of its *nobile officium*. It cannot be disputed that the *nobile officium* is inherent only in the Judges of the Supreme Court, and that there is no such power in any of the inferior Judges in Scotland. I have

already quoted the *dictum* of the Dean of Faculty to the effect that the right to regulate the permanent custody of children is intrusted to the Court of Session as the Supreme Court of equity. Mr. Mackay speaks of petitions for the custody of children being competent to the Court of Session in virtue of its *nobile officium*. Of course it may be agreed that the *nobile officium* is inherent to the Court of Session *as* the Supreme Court of equity, and therefore the quotations from these two writers are not necessarily inconsistent. With reference to this, however, a somewhat instructive observation of the Lord President's (a Judge whose authority in matters of jurisdiction has always been regarded of the highest value) is reported in the 'Scottish Law Reporter' in the case of *Hood* v. *Hood* (8 Scottish Law Reporter, p. 230). For the respondent, Mrs. Hood, Mr. Keir contended that the exercise of such a discretionary power as was argued for the appellant, the father, was only competent to the *nobile officium* of the Court of Session, upon which the Lord President remarked, 'It is a very common thing to confound the *nobile officium* of this Court with its equitable jurisdiction. I think you are doing so here.' Now this is a distinct expression of opinion, in the latest case on the subject reported in the Supreme Court, of the head of the Court, to the effect, in the first place, that the equitable jurisdiction of the Court of Session must not be confounded with the *nobile officium* exercised by that Court, and the power to regulate the custody of children falls to be exercised by the Court not in virtue of its *nobile officium*, but through its equitable jurisdiction. I am aware that a passage in Erskine, Book i. title iii. section 23, may be quoted as against the view that the *nobile officium* is from jurisdiction derived from the Court of Session as the Supreme Court of equity. See also Stair, Book iv. title iii. sec. 1, and Mackay on the 'Practice of the Court of Session,' note *b*, p. 208. There are various *obiter dicta* of the Judges in cases referred to by Mr. Mackay, p. 209 of his volume, to the effect that it is to their *nobile officium* the right of regulating the custody of children is conferred on them; but if these observations of the Judges are not consistent with the opinion of the Lord President previously referred to, I think that a consideration of the derivation of the *nobile officium* goes a considerable way in supporting the view which seems to be taken by the Lord President. Besides, I may say before passing on to consider this derivation, that I hold that the case of *Hood* v. *Hood*, the last authority on the subject, is to be regarded at least as a distinct authority against the view that the custody of children is intrusted to the Court of Session in virtue of its *nobile officium*. If the matter was clearly one of *nobile officium*, then unquestionably the action was incompetent in the Sheriff Court, and nevertheless the Court adhered to the Sheriff's interlocutor, although it was said that the question of jurisdiction was one of nicety. There was no difficulty about the question, if the Court was clear that the power of regulating the custody fell under the *nobile officium*. Mr. Mackay says 'that the Court of Session has exclusive jurisdiction, in the second place, in respect of the power called *nobile officium*; on the ground of necessity, in cases which require an extraordinary remedy or which the statute law has omitted to provide for, the Court affords the remedy or supplies the omission. This branch of jurisdiction is of indefinite extent, illustrated by, rather than limited to, the cases on which it has been exercised, but,' he goes on to say, 'the *tendency in recent times has been to restrict its use to cases in which there is a direct precedent or at least an analogous decision*;' he then proceeds to give illustrations of its exercise, referring *inter alia* to the custody of children. Here I may say that if it be an open question, as I submit it was left by the case of *Hood* v. *Hood*, then Mr. Mackay's well-founded observation, italicized above, comes in as a strong argument for holding that the *nobile officium* is inapplicable to the class of cases under consideration. Whence, then, is the *nobile officium* of the Court of Session derived? Lord Stair deduces it from the analogy of the Roman law (Stair, Book iv. title iii. sec. 1). On the other hand, Lord Kames holds that the *nobile officium* is an inheritance of the Court of Session, to the rights and privileges of the King's Council, and there is no question that the general

opinion of scientific lawyers is to the effect that Lord Kames on this point is right; nor do I propose here to enter into any argument as to this matter, which has frequently been learnedly discussed elsewhere. Assuming this to be the case, is there any reason to hold that an action for the custody of a child between two parents, perhaps of the humblest rank of life (and who may therefore not improbably have no means whatever of litigating in the Court of Session), is an action of such an extraordinary kind as to have required in old times an action before the King's Council? The descriptions of actions which seem to have been entertained before that body appear to have fallen under the following two heads: (1) Complaints on the ground of oppression or excess of jurisdiction on the part of inferior judges, and (2) actions on contract or other personal actions. There is no doubt that the *nobile officium* of the Court confers the right of appointing officers in certain public capacities, that it is a matter of extraordinary remedy; but in so far as regards actions of this nature, I submit there is no room for holding that they are of so exceptional and extraordinary a kind as to require to be dealt with in virtue of the *nobile officium* of the Supreme Court. The terms of the statute 1847, chap. 105, I may also add, I think furnish an argument that such an action as this is one which may be properly brought before the Judge Ordinary of the bounds. (4.) Arriving at the conclusion that it is in virtue of its equitable jurisdiction that the Court of Session has power to regulate the custody of children, then, except in cases where the stations of individuals may be affected by allegations which require to be investigated before the custody of children can be determined, I have come to be of opinion that the Sheriff Court has a concurrent equitable jurisdiction in this matter with the Court of Session, where the litigants are resident within the jurisdiction of the Sheriff Court before which the action is brought. It is as the Judge Ordinary of the bounds that I think the Sheriff is entitled to exercise jurisdiction. It may be strongly argued that the Sheriff has such a concurrent equitable jurisdiction *quoad* the bounds of his shrievalty with regard to all litigable questions, except where the form of action, as declarator, suspension, or reduction, renders it incompetent in the Sheriff Court. But it is unnecessary to advance any such argument here. It seems sufficient to say that an action between the parents for the custody of a child is not an action of an extraordinary or exceptional character, and that being so, it seems to stand to reason that the equitable jurisdiction of the Judge Ordinary of the bounds should not be excluded.

"Regarding this matter of equity it certainly seems advisable that there should be no such exclusion, because to hold that the Court of Session is the only tribunal before which such persons can be brought, would practically be to exclude to many poor people the determination of a class of cases which may be a matter of supreme importance to them.

"There is no difficulty in this case whenever the question of jurisdiction has been decided. There are numerous decisions in the English Court to the effect that a father is entitled to the custody of his child though of tender years. It has even been held there that a father is entitled to the custody of a child that has not been weaned, though it seems doubtful whether such a view of the law with regard to an unweaned child would be taken in Scotland. It is however perfectly clear from the case of *Lilley* v. *Lilley* (Jan. 31, 1877, 4 Rettie, p. 397, and cases there referred to)—(1) That a father is entitled to the custody of a child of only eight months old which has been weaned, and (2) that allegations of cruel treatment to the mother cannot be entertained as a bar to the custody claimed. I do not however consider that a decree should be pronounced in terms of the prayer of the petition without some arrangement being made, such as that which was come to in Lilley's case, and I have accordingly ordered the case to the roll that the interlocutor to be pronounced may give effect to some arrangement for the mother's access to her child. W. C. S."

"*Glasgow, 2nd December* 1878.—Having advised the case, the appeal which was taken to the Sheriff Principal having now been departed from, decerns

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opinion of scientific lawyers is to the effect that Lord Kames on this point is right; nor do I propose here to enter into any argument as to this matter, which has frequently been learnedly discussed elsewhere. Assuming this to be the case, is there any reason to hold that an action for the custody of a child between two parents, perhaps of the humblest rank of life (and who may therefore not improbably have no means whatever of litigating in the Court of Session), is an action of such an extraordinary kind as to have required in old times an action before the King's Council? The descriptions of actions which seem to have been entertained before that body appear to have fallen under the following two heads: (1) Complaints on the ground of oppression or excess of jurisdiction on the part of inferior judges, and (2) actions on contract or other personal actions. There is no doubt that the *nobile officium* of the Court confers the right of appointing officers in certain public capacities, that it is a matter of extraordinary remedy; but in so far as regards actions of this nature, I submit there is no room for holding that they are of so exceptional and extraordinary a kind as to require to be dealt with in virtue of the *nobile officium* of the Supreme Court. The terms of the statute 1847, chap. 105, I may also add, I think furnish an argument that such an action as this is one which may be properly brought before the Judge Ordinary of the bounds. (4.) Arriving at the conclusion that it is in virtue of its equitable jurisdiction that the Court of Session has power to regulate the custody of children, then, except in cases where the stations of individuals may be affected by allegations which require to be investigated before the custody of children can be determined, I have come to be of opinion that the Sheriff Court has a concurrent equitable jurisdiction in this matter with the Court of Session, where the litigants are resident within the jurisdiction of the Sheriff Court before which the action is brought. It is as the Judge Ordinary of the bounds that I think the Sheriff is entitled to exercise jurisdiction. It may be strongly argued that the Sheriff has such a concurrent equitable jurisdiction *quoad* the bounds of his shrievalty with regard to all litigable questions, except where the form of action, as declarator, suspension, or reduction, renders it incompetent in the Sheriff Court. But it is unnecessary to advance any such argument here. It seems sufficient to say that an action between the parents for the custody of a child is not an action of an extraordinary or exceptional character, and that being so, it seems to stand to reason that the equitable jurisdiction of the Judge Ordinary of the bounds should not be excluded.

"Regarding this matter of equity it certainly seems advisable that there should be no such exclusion, because to hold that the Court of Session is the only tribunal before which such persons can be brought, would practically be to exclude to many poor people the determination of a class of cases which may be a matter of supreme importance to them.

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and ordains the defender forthwith to deliver up the child of the marriage between pursuer and defender to the petitioner, or any one having his authority to receive delivery, but reserving to the defender her right of access to said child as follows, viz. the petitioner to give to respondent, or any one sent by her authority, the child in question at his residence, for the purpose of a visit to defender, Wednesday and Saturday of each week, to remain with the defender from 11 o'clock A.M. till 6 o'clock P.M., said child to be then returned to petitioner's residence by defender or some one sent by her; *quoad ultra* continues the cause, that either party may hereafter move the Court in the event of any change of circumstances; further of consent finds no expenses due to or by either party, and allows extract after the expiration of one day from the date hereof. WALTER C. SPENS.

"*Note.*—I have had before me the interlocutor pronounced in Lilley's case in the Court of Session, which at the same time that it ordained the mother of a child to deliver the child up to the father, regulated the mother's right of access to the child. She was allowed to have the child on a visit for one day a week, and the father was ordained to send it to her residence on the day of the week selected by her, to remain from 11 A.M. till 6 P.M. She was further authorized, without 'any attendant, to visit the said child in petitioner's house, without the petitioner being present, at any time she may desire.' The parties in the present case are in a somewhat humbler position than those in the case referred to, the petitioner being a house-painter at a wage, as I understand, of some £2 a week. It is obvious that regulations as to the access to a child which may be reasonable in one case may from the circumstances of the parties be unreasonable in another. I was informed at the Bar that it was part of the voluntary deed of separation which has been entered into between the parties, that my judgment as to the access to be afforded to the defender should be final; I consequently thought I might consult with Sheriff Clark on this point, and he agreed with me in thinking—(1) That it was not advisable that petitioner should be required to send the child, and also (2) that the discretionary power of visiting on the mother's part which was allowed in Lilley's case it was not expedient should be granted, the last named chiefly in consequence of the difficulty it might be for the petitioner to make arrangements in a very small house to carry out such a provision. Arriving, however, at this conclusion, we were both of opinion that the defender should, to make up for what she was deprived of, and which was granted to the mother in Lilley's case, be allowed to have the child on a visit for any two days in the week she might select, and her agent has intimated that she has selected Wednesday and Saturday, which I have accordingly specified in the interlocutor.

"It is certainly unusual in the Sheriff Court to continue the cause that either party may move in the event of a change of circumstances. This was, however, what was done in Lilley's case in the Court of Session, and it seems a reasonable if not a necessary provision in cases of the kind. Arriving at the conclusion that the Sheriff Court has jurisdiction to deal with the custody of children, except in the case pointed out in the interlocutor on 18th October last, it seems to follow as a logical consequence that the Court should take such a step as seems expedient for properly regulating the custody, and I am not aware of any authority which makes such a continuation as that here given effect to in the terms adopted by the Court of Session in Lilley's case incompetent. W. C. S."

SHERIFF COURT OF CAITHNESS.

Sheriff THOMS.

SINCLAIR *v.* MANSON.

This case was reported, when decided by the Sheriff, *ante*, vol. xxii. p. 439. It related to a series of mistakes by a gratuitous consignee in regard to lambs,

and the question arose whether these mistakes were accidental or such as involved legal responsibility. On the effects of such *culpa* little authority is to be found, and hence we report the further proceedings in the case of *Sinclair* v. *Manson* before the Second Division, where an appeal against the Sheriff's decision was disposed of on 14th December 1878.

LORD MONCREIFF.—It is said that there is here only a *culpa levis* liability, but it is more. In the first place, the defender had no right to deal with the pursuer's property, and if he chose to do so without reason he is responsible to the owner. In the second place, when the pursuer had ascertained whose sheep they were, he ought to have given notice and asked instructions. The Sheriff is wrong as to the *wintering*, but the expenses to and from Granton must fall on the defender. I am for adhering to the judgment.

LORD ORMIDALE.—I am of the same opinion. The defender says he thought the sheep belonged to Hamilton. I can understand this defence might be used if he could show he had been led into it by the misrepresentation of the pursuer, but the pursuer did *not* say so; he knew nothing of the transaction or correspondence between the defender and Hamilton.

As to the question of there being no card or address sent by the pursuer. He *did* send an address, and took care that the one hundred accompanying lambs were entered as shipped by him, the pursuer.

But here again the defender makes no inquiry from whom they came, and it is clear he did not ask for the *manifest*, which lay for a week at Wick.

He ought either to have left the sheep alone or kept them till he had inquired as to their owner, and then disposed of them for what they would fetch, and reimbursed himself for expenses. There is nothing to show he did not get the letter of advice on the day of the lambs reaching Wick. I think, therefore, that he is answerable for them from beginning to end. There is nothing to show that the pursuer acted in *malâ fide* at any stage of this case.

I therefore think that the Sheriff was right, and I concur with your Lordship as to the matter of damages.

LORD GIFFORD.—I concur. A loss has been sustained, and we must see who is liable for that loss. I think the defender is to blame.

The Court adhered with additional expenses.

SHERIFF COURT OF INVERNESS.

Sheriffs BLAIR and IVORY.

LIGHTBODY *v.* DOIG.

Jurisdiction—District Sheriff Court—Forum non conveniens.

"*Inverness, 3rd October* 1878.—The Sheriff-Substitute having heard parties' procurators on the defender's plea, that under the circumstances stated in the note of pleas made by the Sheriff-Substitute on the summons, this Court does not constitute the proper or competent forum to entertain this action, nor is the defender bound to plead to the conclusions of it: Repels this plea, and sustains the jurisdiction of this Court: And in respect the defender declines to state any defence on the merits, finds the defender liable to the pursuers in the sum of £43, 10s., with the sum of £3, 11s. 7d. of expenses, and decerns.

"PATRICK BLAIR.

"*Note.*—The agents for both parties appeared at the diet mentioned in the summons and complaint, and I proceeded in terms of the statute (30 and 31 Vict. c. 96, s. 8) to inquire into the nature of the action and of the defence thereto. As to the nature of the action, it is a simple demand for a sum of money, founded upon a contract well known in the laws of all countries. The service of the summons is personal service within the territory of this Court.

"It is not easy to figure any cause of action of more easy extrication or more clearly within the competency and jurisdiction of this Court. But the defender,

when called upon to state his defence, contended that as he was resident in Fort William he was not subject to the jurisdiction of this Court, and declined to state any defence on the merits of the action. I made a short note of the defender's pleas upon the summons at the time, and I now repeat them here for convenience' sake :—

"'Mr. Colvin, for defender, stated that the defender was resident in Fort William, and that the action should have been brought in the Court of the district in which he resides. He therefore declines the jurisdiction of this Court, and craves the Court to remit this case to Fort William ; he further respectfully declines to state a defence on the merits in this Court.'

"This is a plea of *forum non competens*, or, as it is sometimes called, *forum non conveniens*. It is usual, in stating this plea, to mention the circumstances which make another Court a more convenient forum. None such are stated by the defender.

"'It must never be forgotten that in cases in which jurisdiction is competently founded a Court has no discretion whether it shall exercise its jurisdiction or not, but is bound to award the justice which a suitor comes to ask. *Judex tenetur impetiri judicium suum* and the plea under consideration must not be stretched so as to interfere with this general principle of jurisprudence.'

"The decision in the case of *Clements* v. *Macaulay* establishes, that to be successful in the plea of *forum non competens* the defender must show both that this Court is not a convenient forum for the trial of the case, and that another Court exists where the case can be more conveniently disposed of.

"If the plea amounts to that of *no jurisdiction*, in respect that under the Debts Recovery (Scotland) Act, 1867, the defender can only be cited in the Court of the district in which he resides, it may be sufficient for me to refer to the case of *Bell & Son* v. *Macbeth* (15th November 1877), reported in the *Journal of Jurisprudence*, vol. xxii. p. 50, for the grounds upon which I now repel that plea. The sequel of that case is instructive. The case, on an appeal to the Sheriff, was remitted to the Sheriff-Substitute of the Fort William district of Inverness-shire for him to proceed therewith as should be just. On the case being called in that Court the defender failed to appear and state a defence, and the unfortunate pursuers were found only entitled to a decree in absence.

"If this plea is in the circumstances sustained it will introduce a novelty in the practice in this Court, which has been an invariable one since October 1871, and one which received the sanction of Lord Young in the Ordinary cases as far back as 1855.

"Under the Debts Recovery Act the Sheriff does not exercise any new jurisdiction, but his ordinary jurisdiction in a summary form (*Fraser* v. *Mackintosh*, 19th Dec. 1867, 6 Mac. 170). P. B."

"*27th November* 1878.—The Sheriff having considered the defender's appeal and whole process, recalls the interlocutor appealed against, and remits the cause to the Sheriff-Substitute of the Fort William district of Inverness-shire to proceed further therewith as shall be just. W. IVORY.

"*Note.*—The defender in this case is resident in Fort William, and the present cause belongs to that district, where a resident Sheriff-Substitute has been appointed for the disposal of the civil and criminal business connected with it.

"The pursuer, instead of raising his action in the Court of the Fort William district, has raised it in Inverness, where another Sheriff-Substitute resides for the disposal of the business connected with that district.

"The Sheriff was called upon many years ago to consider the best course of procedure in cases similar to the present, and after making inquiry into the practice in other counties, he adopted the rule, which he has since followed, of imposing upon the pursuer the *onus* of establishing sufficient grounds for removing the case from its own district ; and, in the event of his failing to discharge that *onus*, of remitting the cause for further disposal to the Sheriff-Substitute of that district.

"He adopted this rule mainly on these grounds, viz. that the Legislature had provided four separate district Courts in Inverness-shire for the convenience of the litigants, and the proper disposal of the business connected with each district; that it would be a great hardship to defenders resident in islands and other districts at a great distance from the county town, if they were in all cases at the option of the pursuers to be forced to appear at the Court of Inverness instead of at the Court of their own district; that in small debts, and debts recovery cases more particularly, it would seriously interfere with the due administration of justice if pursuers were, as a matter of course, to be allowed to raise in the Inverness Court actions properly belonging to the Lochmaddy, Skye, and Fort William districts—such a course necessarily involving that the defenders must either appear personally in the Inverness Court (travelling in some instances a distance of upwards of one hundred and fifty miles), or incur the expenses of employing an agent there; and that the usual practice, ever since the institution of the district Courts, had been to dispose of the cases belonging to each district in the Court of that district.

"In the recent debts recovery case of *Bell & Sons* v. *Macbeth*, decided by the Sheriff on appeal, 10th December 1877, he gave effect to the above rule. The pursuers in that case failed to establish sufficient grounds for removing the case from its own district, and the Sheriff remitted the cause for further procedure to the Sheriff-Substitute at Fort William. The present case appears to be in a similar position. The pursuer has shown no grounds for removing it to Inverness, and the Sheriff is of opinion that it ought to be remitted to Fort William. W. I."

Act.—MacDonald.——Alt.—Colvin.

PERTH SHERIFF COURT.

Sheriff Barclay.

HUTCHISON *v.* SHAW.

Lease—Extent of possession.—A farm was let at the rent of £162, as possessed by a former tenant, but without any specification of acreage. In a sequestration the tenant claimed a deduction of £35 from the rent, because that the advertisement stated that the farm consisted of one hundred and twenty-seven acres, but that it was found on measurement that there was a deficiency to the extent of twenty-five acres, for which a deduction of £35 was claimed. The following interlocutor was pronounced:—

"*Perth, 3rd December* 1878.—Having heard parties' procurators, and made avizandum with process and debate: Finds that the rights and liabilities of parties must be ruled by the contract of lease, under which there is no specification of extent of possession: Repels the defence, and grants warrant of sale of the sequestrated effects so far as necessary to satisfy the rent due at Lammas last, with expenses, etc. Hugh Barclay.

"*Note.*—All communings before a contract cannot modify a finished agreement, which alone can rule the measure of rights and liabilities. Even though an acerage had been set forth in the contract of lease, if erroneous, this might form a ground of action to reduce the deed as obtained under misrepresentation. But the defender cannot hold the possession and obtain deduction of a part of his rent because of alleged short measure. The action *quanti minoris* is unknown in the law of Scotland. (See 1st February 1840, *Oliver* v. *Suttie;* 12th November 1842, *Hardie* v. *Kinloch.*) H. B."

The Sheriff (Lee) affirmed the judgment on appeal.

Act.—Whyte——Alt.—M'Leish.

SHERIFF COURT OF FORFAR.

Sheriffs MAITLAND-HERIOT and ROBERTSON.

COX *v.* ROBBIE.

Scotch acre—Weights and Measures Act, 1878—*Local custom.*—James Cox, farmer at Williamyards, Colliston, near Arbroath, raised an action against David Robbie, residing at Annfield, near Arbroath, as to whether a sale of upwards of three acres of growing turnips on pursuer's farm was by the Scotch or imperial acre, in which Sheriff Robertson found the agreement to be by the latter measurement, and decerned in favour of Cox for £30, 8s. 9d., the balance of the price. Having been appealed by the defender to Sheriff Heriot, his Lordship issued the following interlocutor :—

"*Forfar, 4th January* 1879.—The Sheriff having heard parties' procurators on the defender's appeal, and made avizandum, and having considered the record, proof, and whole process, dismisses the said appeal, and adheres to the interlocutor of 16th October last except as to expenses, and in the special circumstances of the case finds no expenses due to or by either party, and decerns. FRED. L. MAITLAND-HERIOT.

"*Note.*—The pursuer has brought this action against the defender for the balance of the price of about three acres of potatoes bought by him, grown on the farm of Williamyards, near Arbroath. The only difference between the parties is as to whether the sale was by 'the *imperial* or by the *Scotch* acre.' The pursuer says, 'We concluded a bargain for £30 an acre.' 'I understood when I said 'acre' that it was 'imperial.' The defender says, 'I distinctly mentioned the Scotch acre at this bargain, and he as distinctly accepted it.' There was one witness present at the conclusion of the bargain, viz. William Storrier, who says, 'The bargain was £30 per acre. Nothing was said as to what sort of acre.' In such circumstances the Sheriff is obliged to hold that the bargain was by the *imperial* acre (see Act 5 George IV. cap. 74, sec. 15). This may no doubt be hard on the defender, but, as Lord Mackenzie said in the case of Alexander (24th June 1845, 7 D. 917), 'the statute was meant to be severe and ill-natured, so that if persons will be dull or obstinate enough to resort to these old, inconvenient measures, they must suffer for it.' At the same time, while obliged to come to this decision, the Sheriff has no doubt, notwithstanding Storrier's evidence, that *both parties at the time understood the bargain to be by the Scotch acre.* They had various talks about the potatoes before the bargain was finally concluded, and it may be that then, when Storrier was present, the Scotch acre was not mentioned. But there are three reasons which induce the Sheriff to think that the bargain in this case was understood by both parties to be by the Scotch acre. 1. The pursuer had communings with other parties as to the purchase of these same potatoes. Robert Lyall says, 'I said to him (the pursuer), If you ask £25 per Scotch acre I'll give you a bid for them.' David Anderson says, 'I made Cox an offer as follows: first of all, £26 per Scotch acre, but latterly £27 per Scotch acre. I offered what I thought was full value.' Robert Hampton says, 'I met Cox on the street, and made an offer as follows: £26 for the Scotch acre of 200 poles or £27.' It seems to the Sheriff to be strange when the pursuer was treating with all these parties by the Scotch acre that he should have bargained with the defender by the imperial acre. Why did he not take offers from all by the same measure? 2. The pursuer says, 'David Anderson and John Rennie called upon me after this, also Hampton. These parties made an offer for my potatoes on the field that day. They offered £27 per acre. They mentioned no sort of acre. I told Robbie that they had offered £27 that morn-

ing—£27 per acre—what sort of acre I don't know.' The Sheriff cannot credit this affected ignorance on the pursuer's part. On the contrary, the Sheriff has no doubt the pursuer understood perfectly well what he was about. 3. The defendant's offer of £30 per Scotch acre was a good advance on the offers made by all the other potato merchants, and according to them was full value for them, but £30 per *imperial* acre was a good deal more than the potatoes were worth, and was £10 an acre more than was offered by any other merchant. It appears from the evidence in this case that it has been usual in the Arbroath district of the county to buy and sell potatoes by the 'Scotch acre,' or by 'the Scotch acre of 200 poles.' With reference to this latter mode of selling, the Sheriff may take this opportunity of saying that he can give no countenance to it. The old Scotch acre is *not the same as* 200 imperial poles. To sell by the Scotch acre is illegal; to sell by 200 poles imperial is legal. If the sale be by the 200 poles, why mention the Scotch acre? Why join together two different measures if it be not a mere attempt to legalize a sale by the illegal Scotch acre? The Sheriff thinks that in future, and especially now that the Weights and Measures Act of 1878 has been passed, the public in Forfarshire will refrain from the use of all old and illegal weights and measures, and make a point of using only the imperial weights and measures in the conduct of business. As the Sheriff is of opinion that both parties in this case were culpable—the one in buying and the other in selling by the Scotch acre—he has found neither of them entitled to expenses.

"F. L. M.-H."

Notes of English, American, and Colonial Cases.

TRADE-MARKS REGISTRATION ACT.—*Cotton-marks—Appeal from committee of experts.*—The committee of experts appointed under rule 59 of the Trade-Marks Rules, 1876, are the proper judges whether cotton-marks are trade-marks within the meaning of the Trade-Marks Registration Acts, 1875, and the Court will not order registration of a mark placed by them in the second class without special circumstances. A difference of opinion between the Judge and the committee of experts as to whether marks are or are not trade-marks is not a special circumstance.—Decision of Hall, V.-C., reported *ante*, p. 180, reversed. *In re Orr Ewing & Co., and In re Trade-Marks Registration Acts*, 1875 *and* 1876 (App.), 47 L. J. Rep. Chanc. 807.

RAILWAY COMPANY.—*Bye-law—When unreasonable and bad—Passenger travelling without ticket.*—The 8 and 9 Vict. c. 20, s. 103, enacts that if any person travel in any carriage of the railway company without having previously paid his fare, and with intent to avoid payment thereof, he shall forfeit to the company a sum not exceeding forty shillings. Section 108 of such Act empowers a railway company to make regulations "for regulating the travelling upon or using and working of the railway, and section 109 enables the company, "for better enforcing the observance of such regulations," to make bye-laws provided such bye-laws be not repugnant to law or to the said Act. A bye-law made pursuant to that enactment required a person travelling without a ticket, or failing or refusing to show or deliver up his ticket, to pay the fare from the station whence the train originally started to the end of his journey:—*Held*, that such bye-law was void, on the ground that it attempted to inflict a penalty for doing that without fraud which by section 103 could be punished only if done with fraud, and also on the ground of its being manifestly unequal in its operation and so unreasonable. *London, Brighton, and South Coast Rail. Co.* v. *Watson*, 47 L. J. Rep. C.P. 634.

BILL OF EXCHANGE.—*Liability of master for negligence of servant—Common employment—Railway company—Joint operations of two companies.*—At Leeds there are two railway stations adjoining one another, one belonging to the Great Northern Railway Company and the other to the North-Eastern Railway Company. Part of the lines running into the two stations are used in common by the two companies for the interchange of traffic between the two lines. This part is under the management of a "joint station staff" in the employment of the Great Northern Railway Company. Half of the wages of the joint station staff is paid by the North-Eastern to the Great Northern Railway Company. While S., a signalman on that staff, was employed in his ordinary duties, he was struck and killed by a passing engine of the North-Eastern Railway Company, which at the time he was not engaged in signalling, through the negligence of the driver. In an action against the North-Eastern Railway Company, by the widow of S., under Lord Campbell's Act,—*Held* (reversing the decision of the Exchequer Division), that the deceased was not, at the time of his death, engaged in a common employment or service with the engine-driver, so as to take away the liability of the defendants for the negligence of their servant; and that plaintiff was entitled to recover. *Swainson* v. *The North-Eastern Rail. Co.* (App.), 47 L. J. Rep. Exch. 372.

MINING COMPANY.—*Cost-book system—Action by creditor in collusion with company against a shareholder.*—A creditor of a cost-book mining company will not be allowed to bring an action against a shareholder of the company for the purpose of enforcing a call, and therefore if the action be not really an action by the creditor, but a collusive action by the company, it will be stayed. *Escott* v. *Gray*, C. P. 606.

MONEY HAD AND RECEIVED.—*Banker—Branch bank—Transmission of credit.*—The holder of a promissory note presented it at the head office of the bankers of the maker for payment. They sent it to their branch at the place where the note was payable, where the clerk cancelled the signature, wrote "Paid" on the note, and transmitted a draft in respect of it to the head office:—*Held*, that the head office and branch being one and the same bank, the act of the clerk did not operate to charge the bank with money had and received to the use of the holder. *Prince* v. *The Oriental Bank*, 47 L. J. Rep. P. C. 42.

DIVORCE.—*Foreigner—Jurisdiction.*—N., a Frenchman, acting as French Consul in this country, filed a petition in the English Divorce Court for dissolution of his marriage, and afterwards consented to its dismissal. His wife then filed a petition in the same Court for dissolution of the marriage. The wife was a British subject at the time of the marriage, which was celebrated at Gibraltar, and the alleged adultery by her husband and the greater part of the desertion occurred in England:—*Held*, that the English Court had no jurisdiction to dissolve the marriage. *Niboyet* v. *Niboyet*, 47 L. J. Rep. P., D. and A.

TRADE MARK.—*Piracy—Injunction—Innocent bailies—Priority of lien for warehouse rent—Plaintiff's costs.*—In an action to restrain the infringement by the principal defendant of plaintiff's trade-mark,—*Held*, reversing the decision of Fry, J., that the co-defendants, who were wharfingers, and had received the goods bearing the printed trade-mark in the ordinary course of business without any knowledge or notice of fraud, and had submitted to act as the Court should direct "on having their charges for warehouse rent, and their costs of the action paid or provided for," were entitled to be paid their costs of the action by the plaintiffs, and had a lien of the goods in their possession for their warehouse charges in priority to the lien (if any) which the plaintiffs might have on the same for their costs of the action. And *Semble*, that when the pirated trade-mark was removed, the plaintiffs had no lien whatever on the goods for their costs of the action. *Moet* v. *Pickering* (App.), 47 L. J. Rep. Chanc. 527.

ROADS.—*Locomotive engines on roads—Wheels—Width of bearing surface.*—Upon an information for an offence against the enactment of section 3 of the Locomotive Act, 1861 (24 & 25 Vict. c. 70), that "the wheels of every locomotive" propelled by other than animal power and used upon a highway, "shall be cylindrical and smooth-soled, or used with shoes or other bearing surface of a width not less than nine inches," it appeared that the wheels in question, admittedly not smooth-soled, had for bearing surface strips placed across the tire, itself eighteen inches wide, in a line parallel to the axle, each measuring ten inches in that direction and three inches in the line of the circumference of the wheel, laid alternately against the inner and the outer edge of the tire, so as to overlap each other by two inches in the centre of the tire, and succeeding each other without interval other than the interval of three inches, save where they overlapped, caused by the fact that each strip did not reach from side to side of the tire:—*Held*, going beyond *Stringer* v. *Sykes* (46 Law J. Rep. M. C. 139), that the wheels had not a bearing surface complying with the statute, the bearing surface, although of an unbroken width of nine inches across the wheel, not being unbroken in the line of the circumference, but now on one side of the wheel, now on the other. *Body* v. *Jeffery*, 47 L. J. Rep. M. C. 69.

WINDING UP OF COMPANY.—*Paid-up shares—Mistake—"Issue of shares—Time for appeal extended.*—On the 18th of January 1872 the articles and memorandum of association of a company were registered; but the provisional contract between E. and two trustees for the company for the sale by E. to the company of a mine in consideration of certain paid-up shares was not registered, being insufficiently stamped. The same day, at a board meeting of directors, E., in the belief that the contract had been registered, named T. as one of the persons to whom certain of his paid-up shares were to be allotted. The next day T., who was managing director, hearing of the non-registration of the contract, suspended the issue of the share certificates until the contract had been registered, but in the meantime executed legal transfers of some of the shares to third parties. After the registration of the contract the share certificates were issued and dated as of the day on which they were allotted. On the winding up of the company:—*Held*, that the shares having been originally allotted under a mistake, and the issue of them not having been perfected until that mistake had been rectified, T. must be treated as the holder of paid-up shares. *Re The Ambrose Lake Tin and Copper Co., Lim.; Clarke's Case; Taylor's Case* (App.), 47 L. J. Rep. Chanc. 696. T. had been placed on the list of contributories of the company under an order of the Judge of the Stannaries Court. On the last day, limited by Order LVIII. rule 15, for appealing, T.'s solicitor gave a proper notice of appeal. Four days afterwards T.'s solicitor, thinking that the notice of appeal was irregular, withdrew it, and two days after gave another notice of appeal. The respondent having objected that the appeal was out of time,—*Held*, that the above circumstances, and the fact that the respondent had never really been without notice of a *bona fide* intention to appeal, constituted special circumstances entitling the appellant to an extension of the time for appealing. Ibid.

WINDING UP OF COMPANY.—*Examination of witnesses—Summoning of defendant—Evidence touching matter of the action.*—A company in liquidation had acquired by arrangement with a contributory his claim against third parties for indemnity in respect of certain shares; and was prosecuting the claim in an action with the leave of the Court. The defendants were on the application of the official liquidator summoned to give evidence under sections 115, 117, touching the matters in question in the action. *In re The Accidental and Marine Insurance Company; Mercati's Case* questioned. *Massey* v. *Allen*, 47 L. J. Rep. Chanc. 702.

ADULTERATION OF FOOD.—What constitutes a sale to the prejudice of the purchaser. *Sandys* v. *Small*, 47 L. J. Rep. M. C. 115.

PRINCIPAL AND SURETY.—*Bond—Alteration of agreement between principals—Discharge of surety—Landlord and tenant—Surrender by operation of law.*—In an action against a surety on his bond, whereby he guaranteed the performance of a covenant by his principal, the lessee of a farm and flock of sheep, to deliver up to the plaintiff at the end of the tenancy, with the farm, a like number and quality of sheep regularly heathed and pastured on the farm, it was proved that an alteration had been made in the terms of the letting by the surrender of a small part of the farm and a proportionate reduction of the rent. The jury found that the alteration had not made any material difference in the relation between the parties, so as to affect the capacity of the tenant to perform his covenant:—*Held*, by Cotton, L.-J., and Thesiger, L.-J. (Brett, L.-J., dissenting), that the surety was discharged. By Cotton, L.-J., and Thesiger, L.-J.—Any alteration in the form of the agreement between principals discharges the surety, unless it is self-evident that the alteration cannot prejudice the surety; the surety himself being the judge as to materiality. By Brett, L.-J.—The surety is discharged where there has been a material alteration, or an alteration of some specific provision of the agreement, but not otherwise. By the whole Court.—The mere surrender of a small part of demised premises and proportionate reduction of the rent does not in itself amount to a surrender by operation of law of the old tenancy, and the creation of a new one. *Holme* v. *Brunskill* (App.), 47 L. J. Rep. Q. B. 610.

BILL OF EXCHANGE.—*Stolen bill—Liability of acceptor—Negligence—Estoppel.*—A bill of exchange, with a blank for the drawer's name, and defendant's name written across it as acceptor, was placed by defendant in a drawer in his chambers, from which it was stolen. A drawer's name was forged, and subsequently the bill came into the hands of plaintiff as *bona fide* holder for value. In an action on the bill,—*Held*, that defendant was not liable. By Bramwell, L.-J., because the negligence of defendant, if any, was not the proximate or effective cause of the loss, and therefore did not estop defendant from denying the validity of the bill. By Brett, L.-J., because the bill was drawn without the authority of defendant, and defendant had been guilty of no negligence. *Young* v. *Grote* (4 Bing. 253), *Ingham* v. *Primrose* (28 Law J. Rep. C. P. 294), and *Coles* v. *The Bank of England* (10 Ad. and E. 437), questioned. *Baxendale* v. *Bennet* (App.), 47 L. J. Rep. C. P. 624.

TRADE-MARKS REGISTRATION ACT.—*Costs to be paid by unsuccessful applicant.*—Where an application to register a trade-mark is unsuccessful, the applicant may be ordered to pay the costs of persons opposing the application, from the time when, under rule 16 of the Trade-Marks Registration Rules, the matter is deemed to stand for the determination of the Court, but cannot be ordered to pay any costs incurred before that time. *In re Brandreth's Trade-Mark*, 47 L. J. Rep. Chanc. 816.

ADULTERATION OF FOOD.—Protection to seller buying with a written warranty. Written description not a warranty. *Rook* v. *Hopley*, 47 L. J. Rep. M. C. 118.

OBSCENE BOOK.—Order for destruction of, must state that the publication of the book would be a misdemeanour proper to be prosecuted. *Ex parte Bradlaugh*, 47 L. J. Rep. M. C. 105.

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POWER OF EXECUTORS NOMINATE TO RESIGN OFFICE.

THE question how far executors nominate have power under the Trusts Acts, 24 and 25 Vict. cap. 84, § 1, and 30 and 31 Vict. cap. 97, § 18, to resign their office, is one in regard to which some difficulty has been felt.

Prior to 1861 persons who had undertaken the duties of trustees or executors had no power to relinquish them. In the case of trustees, unless the privilege were expressly bestowed on them by the trust-deed, or the consent of all the beneficiaries was obtained, they required to ask the authority of the Court of Session either by declarator or petition, and show special grounds, in order to get relieved. The cases of *Dick's Trustees* v. *Pridie* (9th June 1855, 17 D. 835) and Petition *Gordon* (2nd June 1854, 16 D. 884) are instances of such application to the Court. In the former case a trustee was held entitled to be relieved of the duties of his office on the ground of bad health, and in the latter, residence in England was held a sufficient ground, the beneficiaries not opposing.

In the case of executors, on the other hand, the only means apparently which the old common law afforded them of getting rid of their office was by bringing an action in the Commissary Court in which they had got confirmation. Our law sources, however, give us very little information on the point. Regarding the discharge of executors, Erskine, in his Institutes (iii. ix. 47), says: "By our old custom, it behoved executors who wanted to be discharged of their trust, and have their accounts settled, to apply for formal decrees of exoneration, upon actions to be pursued by them before the Commissaries against all interested in the executry; which decrees must have contained a particular inventory both of the funds and debts of the deceased, and an account how every part of the executry fund was applied; for general decrees of exoneration were accounted as covers to fraud and concealment, and therefore did not avail the executor.[1] But now of a long time this action has been disused; and executors, when they are sued by creditors, are admitted to plead, by way of exception, that the

[1] Cf. Stair, iii. 8, 75.

inventory is exhausted by lawful articles of discharge." And Bankton (iii. viii. 88), speaking of the exoneration of executors, says: "The fairest and safest way for executors, who are afraid the executory will not answer the demands upon it, is to sue an action of multiplepoinding, before the Court of Session, in order to be exonerated, and therein to call all persons interested, that they may receive their proportion in the distribution of the executory."

The 1st section of the Trusts Act, 1861, gave, for the first time, power of resignation to all gratuitous trustees appointed under any deed or local Act of Parliament, where there was no express provision in the deed or Act to the contrary. The 18th section of the Trusts Act, 1867, provides, "In all cases where a trust-deed appoints the trustees to be also executors, the resignation of any such trustee shall infer, unless where otherwise expressly declared, his resignation also as an executor under such trust-deed."

Now it has been suggested, looking to the terms of this 18th section, that when a testamentary deed makes a nomination of executors to carry out the purposes of the deed, even though these be in their nature trust purposes, the statute gives no power to such persons so nominated to resign office. A testator nominates, say, A, B, and C to be his executors, and directs them to realize his estate, pay his debts and legacies, and pay the residue to his children either after the death of his widow (who is made liferentrix) or upon their attaining majority or marriage. Have A, B, and C, or any of them, in such a case, power under the above-quoted section to resign their office? Or does the fact that they are merely named as executors, without being also named trustees, leave their powers of getting relieved of their office to be determined by the common law?

The difficulty which has been suggested seems to have its source to a considerable extent in the misuse of the term "executor" in some modern testamentary deeds and in recent statutes. In the Conveyancing Acts of 1868 and 1874, for instance, the term has been widely divorced from its true meaning.

In the Institutes (iii. 2, 2) Erskine explains what *executors*, in the proper sense, are. In stating the distinction between things heritable and moveable, he says: "Heritable subjects are those which on the death of the proprietor descend to the heir; and moveables, those that go to *executors*, who are on that account sometimes styled *hæredes in mobilibus*. It may also be observed here, that those who undertake to gather in and distribute among such as are interested in the succession the moveable estate of a person deceased, in virtue of a nomination either by the testator or by the judge, frequently get the name of *executors*, because it is their office to execute the last will of the deceased." It will be observed from this that the word *executor* has two distinct legal significations. In the first place, it may be synonymous (this being its original mean-

ing) with heir in moveables; and in this sense it is still constantly used. Thus when a testator leaves his property to his *executors*, this is at once construed to mean his next of kin—his heirs *in mobilibus*. And the same when a person takes a conveyance of personal property (or heritable securities) to his heirs and executors, it goes to his next of kin, who are, in this beneficial sense, his *executors*. But in the second place, executorship is an office which is performed by simply collecting and dividing the moveable estate of the defunct among those interested in the succession. Erskine further explains the office of executors (iii. ix. 38). "It is the office of an executor to carry the testament into execution in order to distribute the executry effects amongst all having interest in them. A testament is said to be executed in the proper and legal sense when the executor has obtained possession of the moveables belonging to the deceased, or received payment of the debts due to him, or at least established a right to them in himself by decree or corroborative securities."[1] In a recent case (*Jamieson* v. *Clark*, Jan. 24, 1872, 10 M'P. 399), in which the question was raised whether the negative prescription applied to claims against executors, Lord President Inglis took occasion to state in very precise language what an executor's legal position is as compared with that of a trustee: "It has been said that the negative prescription does not apply to a case of executors—that an executor is nothing else than a trustee, and that so long as he has funds in hand undisposed of, he is liable to account for them. This argument is based on a misunderstanding of the office of executor. An executor is not a trustee in the sense of being a depositary. A trustee has to hold as a depositary; not so an executor, who has to administer—not to hold. An executor must pay legacies and debts within a certain time, and is liable in interest if he does not. An executor is nothing else than a debtor to the legatees or next of kin. He is a debtor with a limited liability; but he is nothing else than a debtor; and the creditors of the deceased and the legatees who claim against him do so as creditors."

No more distinct or authoritative passages than these could be quoted to show the true legal position of executors. The proper office of an executor is simply to realize and distribute the moveable estate of the defunct, and when he has done that he is *functus officio*. To enable him to do this, he makes up his title by confirmation, and it is moveable estate alone to which confirmation can apply.

It is by keeping these considerations steadily in view, then, that the question must be solved whether executors, who are not also named trustees in the testamentary deed, but who are appointed to hold the estate for future or contingent division, can resign office under the Trusts Acts, 1861 and 1867. Prior to the Act of 1867 an executor, *qua* such, had, as we have seen, no power to resign. He was

[1] See also iii. ix. §§ 41, 42, and Bell's Principles, § 1899.

vested in his office by the decree of a judge—the Commissary—and he could get rid of it only, if at all, by application to the same Court. But the 18th section of that Act, extending the powers first granted to gratuitous trustees in 1861, makes it possible for an executor, who has been also appointed trustee in the same trust-deed, to resign—that is to say, by resigning as trustee a person may get rid of the duties he has undertaken of realizing and distributing the testator's estate. On the familiar principle of construction, *expressio unius exclusio alterius*, it cannot be doubtful that an executor, who is merely such and not also a trustee, has no power under that section to resign. But how is it to be decided in the case of a testament in which, while there is a mere nomination of executors, the executors are directed not only to realize and pay, but to hold for a certain period; for instance, as we have suggested, to hold and pay over to children after the death of a liferenter, or on their majority or marriage? Testaments in such a form not unfrequently occur, especially in cases where they are drawn by testators themselves. Does such a direction as this change the character of the executors' appointment? Does the prescribed delay in making payment of the estate change their position from that of executors into that of trustees, or do they continue to hold the estate as executors? And, if the former be the true answer, have they not power under the Trusts Acts to resign office? The text-books, in which one might hope to see this point considered—notably Mr. M'Laren's treatise on Wills and Succession—are silent regarding it, and indeed give scarcely any information at all as to an executor's power to get relieved of his office.

Having regard to the proper sense of the term, it seems plain that the moment a person, who is simply nominated executor, begins to hold the estate for the purpose of distribution at some future or contingent period, under a direction to that effect in the testamentary deed, he ceases to be an executor and becomes a trustee. The moment he has completed the collection and distribution of the immediately divisible estate, he is *functus* of his executry duties, and continues thereafter to hold simply in trust. To hold for future or contingent payment, however consonant it may be to the use of the word in certain recent statutes, is altogether foreign to the true signification of an executor. It can make no difference that he is called *executor* in the testamentary deed; it is a mere abuse of language so to describe him. To call a person *executor* who is to all intents and purposes a *trustee* cannot deprive him of his true character or of the rights which attach thereto. But if this be so, it seems clear that a person in the position we have described has power to resign under the Trusts Acts of 1861 and 1867. These Acts nowhere require that the trustee resigning shall be described in the deed of nomination by the particular word "trustee." Neither the word "trustee" nor the word "executor" is a *vox signata*. If the person resigning be *de facto* a gratuitous trustee, that is all the Acts require. He might be designed as

"depositary," "mandatory," "fiduciary holder," or otherwise, that will not affect his rights. And if he be named *executor* in two different senses, it is quite sufficient that in one of these senses he is a trustee. In the converse case, as is well settled, when persons are appointed trustees without being also named executors, they are entitled to be confirmed in the office of executors, in preference to the next of kin. This was settled in the early case of *Kinninmound*, July 27, 1737, M. 3816.[1]

But there remains a further consideration. It may be urged that, granting a person in the position described can resign as *trustee* under the first section of the 1861 Act, he cannot likewise resign as executor under the 18th section of the 1867 Act, for the reason that he does not become a trustee at all till he has completed his executry duties. He is not a trustee from the beginning. His trusteeship is *in pendente;* his right and duties as trustee do not come into existence till the close of the executry. This is a forcible argument and possibly sound; for the words of the 18th section are that resignation *as a trustee* shall imply resignation also as an executor. Still it would seem a more legitimate construction of a testamentary deed in which executors are appointed to hold as well as realize and distribute, to read the deed as if it had in terms named them both *executors* and *trustees;* as if, in fact, the word "trustees" had been omitted *per incuriam.* And especially so, when we consider that the words of the statute must receive a liberal construction, for it is an enabling one. In our view, then, where persons, though named executors merely in any testamentary deed, are at the same time directed to perform proper trust duties, they can resign both offices under the 18th section of the Trust Act, 1867.

But, at any rate, it seems conclusive that no mere use of the name executor will extend or limit the rights and duties attaching to that character in law. In Lewin's "Law of Trusts" (p. 555) the English rule of construction on this matter is stated in concise language: "An executor is regarded in some sense as a trustee, but he cannot, like a trustee, be discharged even by the Court from his executorship. However, when the funeral and testamentary expenses, debts and legacies have been satisfied, and the surplus has been invested upon the trusts of the will, the executor then drops that character and becomes a trustee in the proper sense, and may then be discharged from the office like any other trustee." In England, we may observe, the power of trustees and executors to get relieved of or resign their office is much less extensive than with us.

A good deal of the confusion existing in regard to the exact relations between trustees and executors is to be seen, as we have above remarked, in the use of the latter term in some recent

[1] See the arguments in this case. See also M'Laren on "Wills," ii. p. 196, where the point is considered whether a person can accept the trusteeship and decline the executry.

statutes. By the 20th section of the Titles to Land Consolidation Act, 1868, it was made competent, for the first time, to convey lands by a will or testament. And by the following section it was made competent for executors to hold lands and convey them for the purposes of the deed. So by the 46th section of the Conveyancing (Scotland) Act, 1874, executors are enabled, under a testament in which they have been simply nominated as such, to make up a feudal title to lands. Nothing, of course, can be more utterly foreign to the true legal conception of an executor than that of holding and being feudally infeft in lands or other heritable subjects. The word in these cases acquires a new meaning, and must be regarded as in most respects synonymous with trustee.

To sum up the whole matter, then, we answer the question which we proposed in the outset in this way: 1st, An executor in the proper legal sense—*i.e.* one whose sole office is to realize and distribute the moveable estate of a testator—has no power to resign under the Trusts Acts, 1861 and 1867. If he can get relieved of his office at all before the fulfilment of the executry, which is doubtful, it can only be by application to the Sheriff, as Commissary. 2nd, An executor, in the improper sense of some modern testamentary deeds and statutes—*i.e.* one who is appointed not only to realize and distribute, but to hold both heritable and moveable property for payment on the occurrence of some future or contingent event—has power to resign under the Trusts Acts, as being practically a trustee though in name an executor. And he can, in this latter case, either resign as trustee after he has fulfilled the proper executry duties, under the 1st section of the 1861 Act; or he can, if he choose, resign both offices at the same time under the 18th section of the 1867 Act, before he has completed the executry duties. Sec. 10 of the 1867 Act, providing forms of resignation, applies to both Acts. As to the extent to which the 1867 Act is supplementary to the 1861 Act, see *Maxwell's Trustees* v. *Maxwell*, Nov. 4, 1874, 2 Ret. p. 71. H. G.

TENTH REPORT OF JUDICIAL STATISTICS OF SCOTLAND FOR 1877.

THIS blue-book has just made its appearance. Mr. Donaldson, the able secretary, makes an apology in his letter to the Secretary of State for the late transmission of the Report "because of the pressure of new business on the Statistical department in consequence of the passing of the Prisons (Scotland) Act 1877." Apart from this, it only requires to look at the 139 folio pages of figures to be assured of the great time and labour in collecting from all parts of the country the figures, and subsequently digesting and tabulating them. In former articles on previous Reports which appeared in our *Journal* we showed that a vast amount of the

information in these complex tables can be of no possible use, and are not likely to be read even by the most rabid statistician. We recommended that the sphere of inquiry should be limited to a few important salient points, and all unnecessary minutiæ avoided. This would greatly decrease labour and expense, and render these tables much more useful. As the old saw has it, "one is obliged to search through a battle of straw to find a needle."

The volume commences with the returns of police of county and burgh. It appears that the police force in counties in 1876 was 1235, and in 1877 it was increased to 1271; and in burghs from 2121 in the former year to 2300 in the latter. The expenses of the police establishment in counties in 1876 was £115,534, and in 1877, £111,633; and in burghs in 1876, £167,266, and in 1877, £172,337. The Treasury paid towards the expense in counties in 1876, £43,644, and in 1877, £45,383; and to the burghs in 1876, £71,606, and in 1877, £73,341. It is worthy of remark that in counties the expenditure in 1877 had seemingly decreased, but increased in burghs, though in both the number of the force had been augmented. There follows in the police department nine minute tables of the most trivial description. The second table is termed a "Comparative Table of the number of persons charged and *disposed of* (?) by the police in Scotland from 1873 to 1877 both in counties and burghs." The only observation which may be made on this table is the remarkable fact of seeming excess of police vigilance: in that of 147,043 persons charged by the police there is an average in these five years of 26,533 "where proceedings have been *dropped* (?), and an average of 6936 of persons acquitted on trial," and 16,166 of "offences for which no one has been apprehended or cited." A third table comprehends "county police establishments and effective state of forces on 31st December 1877." The fourth table tabulates the expense of the county police establishments. A fifth and sixth table deals in like manner with burgh police establishments in the same way as the third and fourth had dealt with counties. The seventh table sets forth with irksome minutiæ the number of "persons charged and the offences, with the *result* of prosecution." The great labour incident to this intricate table must have been herculean, and for any vital results is "*labour lost.*" An eighth table has the strange title of "charges *taken* (?) and *disposed* of." This is much an echo of the preceding tables. The tables nine and ten deal with burgh police as previous tables dealt with the county forces.

The second division of the volume is entitled "Criminal Offenders," viz. "persons committed for trial and bailed." This is not exactly correct, seeing that the tables enumerate all offenders though they are *not* bailed, and which is generally the case. The first table under this division purports to give the "number of criminal offenders in Scotland in the five years ending 1877." But this is

misleading, as the figures show that it is only the number of offenders *committed for trial.* It is remarkable how uniform is the figures during these five years:—

	1873.	1874.	1875.	1876.	1877.	Average.
Committed . .	3005	3164	3118	2942	2949	3035
Convicted . .	2110	2231	2205	2051	2009	2121
Not Guilty . .	75	85	83	73	118	87
Not Proven . .	188	237	196	180	176	195

These figures are of some importance, as showing the uniformity in numbers; and how few are put on their trial without being convicted; and how extremely few who are acquitted as innocent with the verdict of not guilty. There follows no fewer than *thirteen* folio pages of minute figures, disclosing the sexes, the ages of the offenders, whether in prison or on bail, their several offences and aggravations, and the interval between commitment and trial, where and how tried, and their sentences, and much more of the anatomy of crime and criminals.

The next division is dedicated to "Prisons and Prisoners," the minute details of which fill thirty-eight folio pages. The first table is the average daily numbers of criminal and civil prisoners from the year 1840 to 1877 inclusive. In the first year of the series the daily average of criminal prisoners was 1940, and of civil 108, and in the last year 2893 criminal prisoners and 77 of civil inmates. The highest average was in the year 1849, when the number of criminals rose to 3143. There are a few remarkable facts worthy of notice, such as previous imprisonments of the same person. It is mentioned that of 47,926 prisoners on an average of the five years there had been no less than 638 in the same prison " fifty times and upwards." This establishes the total worthlessness of short sentences to eradicate vicious habits. Some of the tables are not only worthless, but are actually ridiculous; such as the ages of all prisoners on the sick-list, " the character of their diseases and the time of its appearance," " the number of sick prisoners who have been off work," and the exact the number of days. Take, again, the table of education: its divisions are the numbers " who could not read," " could read with difficulty," " read well," " could not write," " could sign name merely," " write with difficulty," " write well," " had learned more than mere reading and writing," " have improved in reading and writing," " have improved in arithmetic or other branches of instruction," " have learned a trade in prison." Our prisons seem thus to have become educational seminaries. The amount of the several debts for which civil prisoners were incarcerated are given, and the dates of their committal, and the longest detained. It appears that the longest detentions were at the end of 1877, in Glasgow prison, and where two were incarcerated for debts of £1000 and upwards. The largest number of debtors set down as imprisoned was in the prison of the capital of the West, being 293

males and 13 females. Since April 1878 the prisons of Scotland have been withdrawn from county management and put under Government control. This will render in future unnecessary the numerous financial tables which are given in this Report. Since the transfer several local prisons have been extinguished and others substituted in their room. The object is to have larger establishments, which it is supposed will be managed with greater care and made more productive in labour; but this, to no small extent, will be compensated by the expense of removal of the prisoners in addition to risk of escapes. There will be also some difficulty experienced in seats of Sheriff-Courts from the want of the accessory of a prison. The prison-assessment in counties will cease as such, at which the ratepayers seem at present to rejoice; but it will speedily be felt that the Government have undertaken a heavy burden which will render a commensurate addition to national taxation without the local control which hitherto has existed. It is worthy of remark, as showing the guardianship of the Scotch prisons under local management, that in 1877 there were not any escapes, and only two suicides.

We at length thread our way through the labyrinth of Police and Prisons and reach the important section of "*Judicial Statistics.*" The first table applies to the Outer House of the Court of Session, and is a comparative table of the business in the years from 1873 to 1877 inclusive, but with the significant italicized caution, "*As far as returned by the Clerks of Court.*" It is unfortunate for the accuracy of these tables that there is added such disparaging notes as these: "No returns for the years 1874 and 1875 have yet been received from the clerks with office-marks B A, now B M;" or still worse, such a censure as is implied in the note, "The return for the year 1876 received from the clerks with the office-mark B M is defective, and not suitable for publication in this table." A still more flagrant omission is that in the usual column for "quinquennial average ending in 1877." There is a blank throughout, with this astounding note, "*Cannot be given*, the returns for the years 1874, 1875, and 1876 being defective!" We have had occasion in previous articles to notice similar omissions, which render the whole statistics of the Supreme Court destitute of authority. It may be asked, Is it part of the duty of the clerks to afford the necessary information, and if so, is there no compulsion to compel performance of that duty? The statute expressly recognises the duty.

Subject to this grave objection to accuracy, the Report sets forth a gross total of causes [cases ?] depending in the Outer House during the following years as—

1873.	1874.	1875.	1876.	1877.
1795	1529	1549	1795	2363

The table is subject to some criticism. Thus, "cases transferred

from one Lord Ordinary to another" are enumerated first as cases included within the year. But, again, they are deducted from the gross number, and yet in every instance the deduction appears more than the original; nay, there is often a large deduction made when there is no number from which the deduction has to be made. The table proceeds to enumerate the "final judgments within the year" (though *finality* in the Outer House admits of some doubt), next "the number of *causes* (?) taken out of Court otherwise than by final judgment. It is not clear whether decrees in absence or in default of defences are ranked in the number of final judgments. There is tabulated "the character of causes *ended* by *final* judgment," whether "initiated by summons," or "by petition," or "by writs other than summons or petition." We venture to doubt any practical benefit to be derived from this information, and curiously to inquire what is the nature of this "writ" which is said to bring defenders into Court. We know the term in English law but not in that of Scotland. There follows a table showing the *results* (?) of final judgments. Perhaps the character or nature rather than the results or consequences of the judgment would have been the better term. The best result would be compliance with the judgments by payment or performance of the decree. But the so-called results are how many judgments have been given for the "pursuer or other *promoter*." The latter term is known in legislative matters, not in Courts of Justice; then "the number given for defender or respondent," and how many are "mixed judgments." It is seen that in every year the proportion of judgments in favour of the pursuers or *promoters* bears an almost equal ratio of excess to those given for the defenders. This is a matter of some importance, as indicative that parties are not rash in claiming the protection of the Supreme Court, knowing the stern measure of justice there to be administered. The next item of "*procedure* (not causes or cases) requiring closed records and not requiring closed records," is of no importance. The table showing "results as to costs in cases ended by final judgment" is of some importance. It shows that in far the greater proportion of cases the award of costs is in favour of the pursuer. The year 1877 may be taken, because the clerks during that year seem to have been more observant of duty than in prior years. In that year, of 1120 cases the pursuers had costs in 634, and were refused them in 167. The defenders were awarded costs in 152 cases, and were refused them in 76. In 21 cases the costs were borne by a "*common fund*," and in 70 cases "*costs were otherwise disposed of*," a result not easily understood. There follows a table dealing with trial by jury. Here it is exemplified that this system was not in great favour in Scotland in the year 1877. Of the 1120 final judgments given in the Outer House, only 13 were on verdicts; of these 6 were for the pursuer, 4 for the defender, and 3 mixed.

There follows a comparative table of the business in the Inner

House for the years 1873-1877 inclusive, with the quinquennial average. The officials in the *sanctum sanctorum* seemingly have been more attentive or complaisant than their brethren of the Outer Court of the temple of justice, as the column of the quinquennial average has been completed. The gross totals of each year bears an amazing similarity in number, giving 897 causes as the average for the five years. The lowest figure is for 1873, where 818 is given, and the highest for 1877, where the number is 1024. The average of the five years of final judgments is 522. A variety of particular phases in judicial procedure is then given in separate tables of no appreciable importance. The decisions in favour of pursuers and defenders are much in the same proportion as given in the Outer House, but the award of costs to the parties is in the reverse proportion. In the average of the five years, while pursuers received costs in 134 cases, they were denied them in 166. The defenders had costs in 142, and were refused them in 36. In 18 cases the costs were imposed on "*common fund*," and 26 "*otherwise disposed of*." Some satisfactory explanation might be offered on this remarkable distinction between the two sections of the same court of justice in awarding costs to parties litigants. The results of jury trials are much the same as in the Outer House. The quinquennial average is 13; the greatest number in any one year was 17 in 1877, and the lowest was 6 in 1876. The average of verdicts for the pursuers was 9, and for the defenders 4, and only 1 mixed verdict. There is a very important section as to the result of appeals from the Lord Ordinaries. The average has been 122 affirmances against 34 reversals, with 8 adhered to, but on different grounds, and 15 partially adhered to and partially reversed. Another table shows the number in dependence before the Lord Ordinaries, and the date of their introduction. There remained 801 on the rolls at the close of the year 1876; the oldest of the number was initiated in 1830, and 615 had their judicial birth in 1876. A variety of tables are inserted of no great practical importance, such as a table intending to show the number of weeks (why not days?) elapsing between closing a record and pronouncing judgment; or another to show cases which have been disposed of after reports by "men of business and skill," "accountants of Court," "other accountants." An *entire* table *is* given in blank, with the significant note, "No analysis given by clerks!" A table gives the number of petitions before the Junior Lord Ordinary for the year 1877. The number appears to have been 680. A table is given of the results of appeals from the Lord Ordinaries to the Inner House in 1877. Lord Ormidale has 1 judgment affirmed; Lord Gifford 2, both affirmed; Lord Shand, 6 judgments—2 affirmed, 3 reversed, and 1 partially so; Lord Young has 33 judgments—22 adhered to, 2 affirmed on different grounds, 4 reversed, and 5 with mixed judgments; Lord Craighill has 40 judgments—28 affirmed, 3 the same, but on different grounds, 7 reversed, and 2 on mixed

judgments; Lord Curriehill had 41 judgments under review—27 of which were affirmed, 2 the same on different grounds, 11 reversed, and 1 a mixed judgment; Lord Rutherfurd Clark has 56 judgments appealed—43 of which were affirmed, 1 on different grounds, 7 reversed, and 5 mixed judgment; Lord Adam has 30 judgments—18 of which were affirmed, 8 reversed, and 4 partially affirmed and partially reversed. There were ten appeals under the Registration Acts heard and disposed of by Lords Ormidale, Muir, and Craighill. There was no election petitions. Fifteen paupers were admitted to the poor roll. A table is given of one action of cessio, but which in future will be unnecessary, as the original jurisdiction has now been withdrawn from the Court of Session.

The next great division of the Report is devoted to Sheriff Courts. The first table gives the business of these Courts for the years 1873 to 1877 inclusive. The number of cases are remarkably equal during the series of years, and give the quinquennial average, 9327. The highest figure was 9928 in the year 1875, and the lowest 8400 in 1873. The average of decrees in absence was 3452, and judgments *in foro* 2587. There is given the total amount of costs awarded during the several years, and whether "they were taxed or *otherwise fixed*" (?) and "causes where refused to both parties," and "causes where amount of costs *entered* in process," which last is not of easy solution. But it is not stated, as in the statistics of the Supreme Court, on which side costs were given. It is remarkable that whilst the amount of costs are stated in each year, yet neither in the Sheriff nor Supreme Courts are the principal sums the subject of litigation stated. This would have been a subject of much easier ascertainment than that of costs of suit. The quinquennial average of costs in Sheriff Courts is £18,395. The lowest figure is under the year 1873, £13,878, and the highest under the year 1877, when the amount was £23,295. There is a very suggestive table given as to the number and disposal of appeals from the judgments of Sheriff-Substitutes to the principals. The average of appeals for the five years is 942, of which were *affirmed* 701 (not *sustained*, as erroneously stated in the tables), whilst reversals amounted to 141, and "mixed judgments" are stated at 100. In another table it is set forth that in 3272 final judgments given *in foro* by Substitutes 1903 were not appealed to the Sheriff, and 1738 were appealed, three being six times under appeal, and two above six times! The oldest depending case in a Sheriff Court is debited to Glasgow, where an action dates its judicial birth in 1870. A statement is given as to time occupied in giving judgments by Sheriff-Substitutes within the year 1877. This table is portioned into weeks extending from "one week and under" to thirty-one weeks. As might be expected, by far the greater number find their place in the first or despatch column, and only one finds its place in the longevity niche. This is debited to the Sheriff Court of Glasgow, but with 1233 judgments such a circumstance is no

cause of wonderment. The principal Sheriffs are subjected to the same surveillance as to time as was applied to the Substitutes. A table is provided for them with column extending from one week to forty-seven weeks. The oldest lingerer is found in the fourteenth week, and is set down to the debit of Dunblane. It is curious to find in this table no less than seven columns left wholly blank, and why these and the forty-seven weeks should have been so needlessly printed is a subject of mystery, especially why the forty-seven weeks should have been set down as the utmost endurance of "hope deferred." The statistics of Sheriff Courts are continued to every department of judicial and administrative business. There are copious details given as to that amphibious section of the Court known as the "Debts Recovery," which it would be well to have abolished as a separate form of process. Here it is remarkable that the amount of the sums claimed are given, though withheld in the ordinary Court. The quinquennial average gives 4177 cases in this section of the Court, the amount sued for being £66,764. The average of appeals to the Sheriff Principal was 195, and to the Supreme Court 4.

The Sheriff Small Debt Court comes next in order, with an average in number in the five years of 46,351, with an average amount of claims amounting to £159,095. It will be observed from these statistics that with few exceptions the Small Debt Circuits have become almost extinguished. Many show the number of cases below 10, whilst others have only had one case during the five years. The facility of transit is now so rapid and so cheap that the further keeping of these itinerary courts might be dispensed with.

There is a separate division for the Justice of Peace Small Debt Courts. The quinquennial average of the number of cases is 14,098; the lowest figure is under 1873, being 12,340; and the highest in 1877, being 15,988. The amount claimed (£5 being the limit of that jurisdiction) on the quinquennial average was £24,784. The lowest figure is under the year 1873, being £21,969, and the highest in 1877, being £28,890; so these courts, both in numbers and value, appear to have increased. The quinquennial average of fees collected was £1315. The lowest figure is under the year 1873, being £1143, and the highest under the year 1877, being £1492, showing a steady increase as the business increases. It is worthy of notice that in no other judicial department but this has clerks' fees been enumerated. The greatest number of cases instituted in 1877 is set down as having occurred in Glasgow, showing 5412; and the next in order is Edinburgh county, 2542, and city, 1991. There appear about sixty places where Small Debt Courts of the Justices were wont to be held which appear to have had no sittings in 1877. The tables deal with the most trivial minutiæ, detailing the character of the decrees and the total sales by poinding, with the amount of the principal sums, total expenses, the proceeds of sales, total expenses of poinding and

sale, and surplus paid to the debtors. One folio page is dedicated to this executorial work, showing that of the ninety-six courts of the justices only six of them have made any return, so that the columns remain in blank, and show that the only surplus paid to debtors was in Edinburgh, which stands alone in the appropriation column. All this, and much more akin, is of no practical use, and must have cost a vast amount of labour, and it is to be feared in many instances must of necessity have been mere guess-work.

The volume is concluded with some very important tables on the "Judicial Records." The first is on "*Bankruptcy.*" But it is obvious that the tables deal only where Bankruptcy assumes the phase of "Sequestration." These appear in the quinquennial average, 2980 in number; the lowest being in 1872, in number 2869, and the highest in 1876, being 3215. There is a table strangely inserted in the midst of the Bankruptcy section of the "Judicial Records kept at Edinburgh," a minute detail of the several departments, with the fees collected in each. This table is one of great importance, and may require attentive consideration. *Bankruptcy*, meaning *Sequestration*, is again prolonged through many stages, some of which are of considerable utility, but others are of little or no importance. After disposing of "Judicial Factories," the Judicial Records are resumed, with some important details. It appears that under the statute 31 and 32 Vict. c. 54, there have been entered 43 certificates of foreign judgments—41 from England and 2 from Ireland.

The volume throughout shows great pains and labour on the part of the Statistical Department in Edinburgh. But we again venture humbly to suggest that much greater simplicity in details might be obtained and much expense saved, without any sacrifice of information useful for any practical purposes. H. B.

THE PROOF OF NEGLIGENCE.

(*From "The Solicitors' Journal."*)

In the two recent cases of *Bridges* v. *North London Railway Company* (L. R. 7 H. L. 213) and *Jackson* v. *Metropolitan Railway Company* (26 W. R. 175, L. R. 3 App. Ca. 193), the House of Lords has corrected on the one side and on the other the looseness with which judges had of late interpreted the rules of practice applicable to the trial of actions f.r negligence. And though (expressed in general terms) these cases decide no more than that where there is any reasonable evidence to leave to the jury—that is, any evidence on which a reasonable man (not ought to) but could or might act—the judge ought to leave it to the jury, and that where there is none such, there is nothing which he ought to leave to them; yet there can be no doubt that they will furnish useful landmarks in a region

where (however plain and simple the way may seem) the acutest and strongest intellects have been repeatedly baffled and misled.

In *Dublin, Wicklow, and Waterford Railway Company* v. *Slattery* (27 W. R. 191, L. R. 3 App. Ca. 1155), the House has had these rules again under its consideration, but under a new aspect; and it may be useful to examine the case for the purpose of discovering what has been in fact decided, and what practical guidance the decision will give. The action was brought, under Lord Campbell's Act, for death caused by alleged negligence in the defendants, a railway company. The deceased, though not a passenger by the line, was accompanying intending passengers; he had crossed the line to the booking office and procured their tickets for them, and when the accident occurred he was recrossing the line with the tickets. This is, however, not a sufficient nor, indeed, an accurate statement; the train was to start from the platform which he had reached and where he had procured the tickets; it was not necessary therefore to recross the line; what he in fact did was this—the train being already in, and the intending passengers in danger of missing it, he went behind the train and advanced across the line, beckoning to his companions; in this position he was struck down by a train coming along the further line of rails, the driver of which (as the jury found) did not whistle. A verdict having been twice found for the plaintiff (against which the presiding judge did not on either occasion report), the Court of Common Pleas in Ireland, and on appeal the Court of Exchequer Chamber, decided that there was evidence to go to the jury of negligence in the defendants causing the death of the deceased, and that the judge was right in leaving to the jury the question whether the deceased was guilty of contributory negligence. The decision, however, was not unanimous; Keogh, J., in the Court of Common Pleas, doing all but formally dissent; and the Court of Exchequer Chamber being equally divided. In the House of Lords, to which the defendants appealed, the case was twice argued; on the first occasion the House (consisting of four members) were equally divided; on the second argument the House (consisting of eight members) affirmed the decision by a majority of five against three. The majority consisted of the Lord Chancellor and Lords Penzance, O'Hagan, Selborne, and Gordon, the minority of Lords Hatherley, Coleridge, and Blackburn.

The first question was whether there was any evidence of negligence in the defendants causing the death of the deceased, and this depended on the inquiry—first, whether at the time of the accident the deceased was in a position in which he was entitled to require the defendants to use any precautions on his behalf or whether he was "at his own risk;" secondly, whether they omitted any precaution which, under such circumstances, they were bound to take; and, thirdly, whether such omission was a cause of the accident.

Upon the first point the finding of the jury (a finding which could not be disturbed unless there was *no* evidence in support of it) was, that "the defendants, by the conduct of their servants, did hold out to the public that persons accompanying intending passengers might pass along the path through the Horseshoe Gate and cross and recross the railway at the crossing opposite the gate (the crossing in question); and that the deceased was, at the time of the accident, lawfully using the line."

With reference to this point, an observation of Lord Coleridge at once attracts attention, that "the proper crossing, the crossing *which if he* (the deceased) *had used no accident would have happened*, was elsewhere. He therefore took the crossing *cum periculo*, or, to use a favourite phrase of Lord Campbell, *tale quale*." Treating the case on this footing, his Lordship held that, although a licensee and not a trespasser, yet the deceased man having elected to take a dangerous crossing, which was only permitted, instead of a safe one which was provided, took it with its risks; and could expect no precaution to be used on his account, not even those precautions which were, in fact, taken for the benefit of such as used the proper crossing. Now, if the majority of the House of Lords, in deciding against the railway company, had meant to lay down that where there are two modes of crossing a line, one provided and safe, the other only permitted and evidently dangerous, a man who uses the dangerous crossing is entitled to recover for injuries caused by passing trains, although if he had used the other he would have been safe, it would be a ruling of serious consequence. But, in fact, so far as can be discovered from the reports, whether in the House of Lords or in the Courts below, there was nothing whatever to show what was the nature or position of what is called the "proper crossing," or that if the deceased had crossed there he would have been safe. On the contrary, so far as appears, the omission to whistle, which was the cause of the accident, would or might as well have been the cause of the like accident if the deceased had been at the "proper crossing." Had it been otherwise it is scarcely to be supposed that at the trial some finding directed to the point would not have been asked for by the company. This point, therefore (which is noticed by none of the other noble Lords), must be discarded, and it must be taken that on the findings the crossing in question and the other crossing, whatever or wherever it was, were obnoxious to the same dangers, and required for their safe use the same precautions. Lord Blackburn, indeed, is not satisfied that there was any evidence of an "invitation to cross," an ambiguous and misleading phrase, which evades the question of what obligation to care a permission to cross imposed on the defendants; but this is a different point, and the remark would be equally applicable if there were but one crossing, sometimes safe because trains were not passing, and sometimes dangerous because they were—a matter which belongs to a different head. And upon the first point it must be taken that

their Lordships assumed the crossing in question to have been what may be described as an alternative crossing with the other, and, equally with it, open and permitted to passengers.

The next point, and the one to which the observation just cited from Lord Blackburn applies, is this: assume a level crossing over a line in a station, what precautions does the existence and permitted use of such a crossing impose on the company as necessary or proper to be taken? If it is a standing "invitation" to cross simply, there is a standing necessity and obligation to warn against coming danger; if it is only a standing invitation to cross *when safe*, coupled with a standing warning of danger afforded by the nature of the place, there is no such necessity or obligation, and liability only arises when the company specially invite to cross or announce safety. Now it is an important question whether, at a place like a railway station, where numerous persons, many of them little experienced in the dangers of a railroad, do and must cross and recross in their business with the company, a company can leave what appears to be a standing invitation to cross without any warning or protection, relying merely on the fact (though the remark is a true and just one) that a railway is itself a warning. The argument contained in this remark proves too much. People cannot be called on in favour of other persons to anticipate and provide against their negligence; they cannot, therefore, be negligent in not doing so; if a thing can happen only by the negligence of the plaintiff, it follows that it cannot be caused by the negligence of the defendant; for there can be no negligence in the defendant in not providing against the plaintiff's negligence. The argument would, therefore, show that a person knocked down in using such a crossing (unless under the company's escort) could never recover against the company; for, according to the old dilemma, if he did not look he was negligent; if he did look and saw the train coming but went forward, he took his chance, and the company cannot be liable for his miscalculation; he could, therefore, only recover if he acted on the explicit direction of the company's authorized servants, and took their judgment as his; if indeed this itself would not be an incautious thing to do. Yet this seems to be the view taken by Lord Blackburn. It would be satisfactory if we had a more distinct and exact statement of the law on this point than the present case affords us, for when examined it is not strictly an authority upon it. Whistling was, by the defendants' own practice, accepted as a proper precaution to take, and, according to the finding of the jury, its omission caused the accident. If the company had never whistled, it is not decided how far that or some other precaution of the like kind would have been obligatory on the defendants. The facts proved at least showed some evidence of negligence on which a jury could act.

There is a third point on which it must be confessed that a more exact statement would have been desirable—the question whether

there was any evidence that the deceased was lawfully on the line. The doubt on this point is forcibly put by Keogh, J.: "Here we have a person who had no business at all upon the line. He was not crossing the line to make a short cut on his way home, or for the purpose of going from one part of the country to another. He was simply one of a number of persons who went to the station to see a friend off by the train. When there, he is not satisfied with crossing the line, but must needs endeavour to recross it at the back of a train which was then at the station, for the purpose, it would seem, of beckoning to his friends to come on. In that attempt he was knocked to pieces by a train passing from the opposite direction. He appears to me to have been a mere volunteer upon the line, and to have had no business there. He was there without any object which would justify his presence; he was there at his own risk, and he appears to have taken no precaution" (I. R. 8 C. L. 539). Whatever may be the extent of sanction or permission given to the public to go over a level crossing and the corresponding duty of precaution, as it certainly cannot extend to persons who have no business in the station at all, so it cannot extend to persons who though passengers, or persons having business with the company, have no business *on the line*. It could not, however, be reasonably said that a man had no business on the line only because he conducted himself negligently, or that the permission was only to persons using it with care. This would be a short cut to the decision of what was perhaps the chief point of discussion in the present case—the question where the burden of proof lay; for it is obvious that in this view the plaintiff must establish his own diligence. But excluding this extreme argument, the question still remains, How far does the permission extend? or, Who may be said to be lawfully on the line because there in pursuance of the permission? Though nothing is formally laid down, it is material to observe that, on the authority of the present case, a person in the situation described above is a person as to whom it may be said that there is evidence for the jury that he was lawfully on the line.

In the result then, it was held by the five Lords who formed the majority, and also by Lord Hatherley (Lords Coleridge and Blackburn being on this point the only dissentients), that there was evidence to go to the jury that the deceased, being a person entitled to have precaution used on his behalf, met his death through the negligence of the defendants.

The most characteristic feature in the case, however, and the one to which most argument was addressed, was the question how far the decision on the issue of contributory negligence is for the judge and how far for the jury. It is to be regretted that in several of the judgments this question is made to appear one of pleading; for there can be no doubt that, whether under the old general issue of not guilty, or under a form of pleading which first traverses the

negligence of the defendant as a cause of the accident, and thus affirmatively sets up the case of contributory negligence, the question is the same. The modern form of pleading only expands what was involved in the old general issue, but does not in any way affect the burden of proof; and this is admitted by Lord Penzance. The question of pleading may, therefore, be discarded, and the substantial inquiry remains, When may the judge withdraw from the jury the issue of contributory negligence? That he may do so when there is no evidence of contributory negligence is conceded; the case is parallel to the case of there being no evidence of negligence in the defendant. The difficulty arises where there is evidence of contributory negligence, and the question is, Can the judge decide that issue in favour of the defendant? As Lord Penzance observes, the question so stated "hardly admits of argument;" to state it is to answer it. If the judge may affirmatively find that issue for the defendant, why may he not affirmatively find for the plaintiff the issue of negligence in the defendant?

The question, however, seems to lose some of its simplicity from the fact that the plaintiff has to make out his case; it is here the opening for controversy arises, and the question is, Must the plaintiff establish the complex proposition that the accident happened from the defendants' negligence, and without negligence on his part, or the simple proposition only that it happened from the defendants' negligence?

The complexity of the problem, however, is again somewhat resolved by the following considerations: In the first place, it is not pretended that the defendant may not, if he can, do here what he may do always—make out his case, that is, the case of contributory negligence from the plaintiff's own evidence. Secondly, it is conceded that as he may by any other means show that the alleged cause—his own negligence—was not really a proximate cause of the accident, so he may show this by means of the plaintiff's own acts, as well when disclosed by the plaintiff's witnesses as by his own; in other words, he may show that the plaintiff's conduct was such that, although his own negligence had not occurred, the accident would equally have taken place. Just as the plaintiff's negligence becomes immaterial if no care on his part would have been enough to prevent the effect of defendants' negligence; so the defendants' negligence is immaterial if no care on his part would have prevented the mischief from happening through the plaintiff's act. But this, as Lord Penzance points out, is not an inquiry into the plaintiff's negligence, but into the actual cause of the mischief, and goes to show, not that the plaintiff's negligence contributed to the catastrophe, but that the defendants' negligence did not; it is the disproof of that part of the issue which is confessedly on the plaintiff. Thirdly, it is admitted that the plaintiff has never, in the first instance, to establish the negative proposition that his negligence did not contribute. Lastly, it is admitted, as a necessary

consequence of the last proposition, that unless something happens to throw upon the plaintiff the burden of discharging himself from the imputation of contributory negligence, the judge can no more find that issue in favour of the defendant than he can find the primary issue in favour of the plaintiff.

The question is thus narrowed to the inquiry whether, assuming the defendants' negligence to be proved, and assuming it to be proved that it caused the mischief, it is ever true to say that the course of the evidence may establish against the plaintiff so clear a case of contributory negligence as to throw upon him the burden of discharging himself, and to entitle the judge to withdraw the case from the jury unless he fails so to discharge himself. Now, stated thus, the proposition presents a curious aspect, for by whose decision is he to discharge himself? The matter (it is assumed) is now in the hands of the judge, who rules that the plaintiff is called upon to discharge himself. But how is he to discharge himself? He cannot discharge himself to the jury until he has first discharged himself to the judge; for until he has succeeded so far, he is still under the burden laid upon him, and his discharging himself is a necessary condition of ever getting to the jury. The odd result is thus reached that, either the question must remain wholly in the hands of the judge, or at least the plaintiff must get so far as to persuade the judge that there is evidence fit to be laid before the jury of his having discharged himself. But this last alternative is inadmissible, for as the judge determines that he has incurred the burden, so it must be the judge who is to determine that he has discharged himself of it. The matter therefore is wholly for the judge; and, however it is disguised, the proposition contended for comes round to this, that the judge may affirmatively find the issue of contributory negligence in favour of the defendant.

The broad result of the decision in the present case is to negative this proposition, and to restore the law to its proper simplicity. The perplexity has been caused by the desire of some strong judges to enforce on plaintiffs the duty of self-preservation, and to protect defendants (and especially railway companies) against claims which have nothing to stand upon but compassion and prejudice. The desire was praiseworthy; but the effort has not been always happy in its results. It has produced some dilemmas which have in their time been celebrated, and some entangled wreaths of argument, specimens of which may be studied in the judgments of Lords Coleridge and Blackburn; it has nonsuited a great many plaintiffs, and has helped to clear a great many cause-lists; it has made a path where weak judges after a while walk as freely as strong ones, and where, when they have once learned the way, they find it much easier to walk than to try causes; it has saved some defendants from unjust verdicts, and has, perhaps, defeated as many plaintiffs of their just claims. Amongst other things the proposition enunciated by Lord Blackburn was one of its latest births, and it may be

hoped that the condemnation of this doctrine by the House of Lords, together with the general tendency and purport of the decision, will assist in keeping within its due bounds the useful, but somewhat restless and encroaching, practice of nonsuit.

It is, however, to be hoped that no more cases of negligence will, for some time to come, reach their Lordships' House. The value of their decisions depends to a great degree upon their rarity. It was the frequent agitation of such matters in the Courts below that at last deprived their decisions almost of all authority, by leaving no line of argument without an authority to support, and a judge to champion, it. The same disastrous results would attend the decisions of the House if they were cheapened by frequency; above all, if the hope could be entertained of dividing by four against four a House which has only decided by a majority of five to three.

THE LIFE AND ADVENTURES OF A *NOMEN JURIS.*

THE use by the legal profession of peculiar and technical words to express certain ideas has the weight of antiquity to support it, and, further, has the advantage of securing in deeds a uniformity of expression calculated to remove the possibility of misinterpretation and of doubt. On the other hand, it is very often and very justly said of lawyers by laymen that not a few of these peculiarities have been the invention of those for whose pecuniary and professional benefit they were intended. To these remarks especially the *nomina juris* are open, as being words with a special meaning assigned to them in law, with a special force attached to their presence or their absence in a deed, and with presumptions created about them calculated to drive an ordinary mind to the verge of distraction. Without defending the existence of these anomalous beings, it must be conceded that they find a home wherever law can plant its foot. Among the old civilians were men who gloated over the complications, the technicalities, the mass of nearly useless details, poured as a flood over the really simple system of the Roman Law as it stood in its earlier days; and when the great empire crumbled into fragments, the various nations which found life among its ruins gathered the cobwebs of the law together, only to weave them into a yet more tangled mesh. Thus it has been that in all the countries of the civilized world—in some more, in some less—a tendency has arisen towards the recognition of certain technical words as having a peculiar value, until what may in some cases at first have been only a preference becomes gradually a superstition, and at last a law as rigid as that of the Medes and Persians.

In some instances, however, and notably in that of the word "dispone," whose history we are about to consider, the technical

use has arisen from the character of the tenure by which all the land in the country was held; and going back somewhat beyond the reasons given by our institutional writers, to which reference will shortly be made, it may be observed that when the return to the superior from his land was military service, not merely in form but actually in fact, then it was necessary always at once to have some one who could by himself or his substitutes give the necessary service, and this may have tended to establish a rule as to the transmission of land *mortis causa*, a rule at first absolutely negative of the power of alienation. Passing on, however, from these conjectures, we come to a period when the older state of things had been swept away before the advancing tide of civilization—when the proprietor of the land no longer paid to his superior any save pecuniary services. Then it is that we find that rule gradually established by which the "dispositive will" of the person who alienates is recognised as the special and essential element to the due transmission of the land. Stair (ii. 3, 14) says that "the writ requisite to constitute a fee must contain the present dispositive act of the superior, by which he dispones to the vassal and his heirs the fee, in whatsoever terms he expresseth it, whether he gift, grant, alienate, sell, or dispone, though these several terms expressed may import a different title and warrandice; yea, albeit no title or cause be expressed or implied, but only that the superior dispones." And again (iii. 2, 3): "The question then is, by what act men may naturally exercise the power of disposal which can be no act of the understanding, that being only contemplative and nothing active or operative for constituting or transmitting of rights; but it must needs be an act of the will, for by it rights are both acquired, relinquished, and alienated; there may be three acts of the will about the disposal of rights: a resolution to dispone; a paction, contract, or obligation to dispone; and a present will or consent that that which is the disponer's be the acquirer's. Resolution terminates within the resolver, and may be dissolved by a contrary resolution, and so transmits no right; paction does only transmit a personal right or obligation, whereby the person obliged may be compelled to transmit the real right. It must needs then be the present dispositive will of the owner which conveyeth the right to any other, which is expressed by such words *de præsenti*: 'Titius disponeth, alienateth, or annailzeth, gifteth, granteth, selleth,'" etc. When we come to seek the reasons for this peculiarity in our law, this requirement of a *de præsenti* conveyance, this repudiation of any *mortis causa* deed as affecting land, we find that they are intimately connected with the very first principles of our land tenure. The feudal system seems when in full force to have created for the whole land of the country what practically was a strict entail. No vassal could, even during his own life, alienate his land without the consent of his feudal superior. By degrees this was relaxed,

and a power of alienation *inter vivos* was obtained. We are told that at first the mode adopted was for the proprietor in possession to call to the succession a new heir, to whom he actually during his own lifetime disponed the lands and gave seisin, thereby cutting off any possibility of dispute subsequently after the granter's death. However, it was not long before this method gave way to another form of greater stability, for in point of fact it endured until abolished by the Act of 1868. To effect his purpose in this way the owner disponed the fee of his estate, but retained at once the liferent and the power of revoking the deed if he should think fit.

In England, where, of course, the feudal system also was in force, though probably under greater local modifications from special customs and so forth, the same state of matters will be found to have existed. There we learn that a different mode of evading the difficulty was found in what has been termed the doctrine of uses, originally an ecclesiastical invention, intended to avoid the regulations of the Mortmain Acts, but subsequently applied in a more general way. A trust was created in one person for the use of another. Ultimately, however, all these evasions and fictions were swept away, and full power to devise was given.

In Scotland, as we have seen, the owner who wished to alienate his land at his death adopted the form of a disposition of the fee, with the retention of the liferent and of the power of revocation. This device was accompanied by the necessity for the use not merely, it would appear, of dispositive words, but of the word "dispone" in particular. To quote Erskine on this point (iii. 8, 20): "Indeed it appears to be conformable to present practice that a man may effectually settle his heritage in a testamentary deed, reserving to himself the liferent and a power of revocation, provided he make use in the conveying clause of the words *give, grant,* or *dispone,* in place of *legate* or *bequeath.*" It may be observed *passim* that this passage was quoted in the case of *Henderson* v. *Selkrig* (June 10, 1795) as an authority against the necessity of using the *nomen juris,* provided the other words were used. The only word in the deed in that case was "give." Ross (Leading Cases, Land Right, vol. i. p. 22) tells us that on the margin of the pursuer's pleadings where this passage is cited Lord President Campbell has written, "He ought to have said, give, grant, *and* dispone."

How it is that the particular word "dispone" was alone held to carry with it the peculiar power of effectually transmitting heritable property we have not been able to learn. Was it an old monk, the earliest of conveyancers, who, racking his brains to fill the coffers and multiply the acres of the abbey he served, first thought of the mystic word? or was it only a crabbed lawyer with a taste for technicalities who condensed such valuable ideas into the space of seven letters? We cannot tell. Plenty of synonyms may be found for the idea contained in the word itself, and yet

this alone is the mode in which the law formerly permitted the transmission to be effectually performed. Dallas in his Styles, published about the middle of last century, gives us the word "dispone" in every example of transmission of land, whether it be from one vassal to another, or of Crown charters alike original and by progress. Another writer narrates as the proper dispositive words of an original charter, *dedisse, concessisse, et disposuisse,* and in the case of a vassal to his superior, or to any other purchaser, "have sold, alienated, and disponed, as I by these presents sell, alienate, and dispone," adding that the effective words in all sales are "sell, alienate, and dispone." "Although all this," said a learned Judge (Lord Deas), "does not prove the word 'dispone' to be essential, it goes to account for its having come to be held so in the ruling clause of the deed in which it was not unnaturally thought that there ought to be some fixed term required as matter of solemnity." We look at these things by the light of a very different system. What then was not unnatural appears to us much the reverse. We are striving, if it may be, to make law simple, to give effect to the real intention of every man, whether conveying *inter vivos* or *mortis causa,* and all these technicalities seem petty and contemptible in the noonday of civilization; but in their day they may have had their uses, and they may have aided to bridge over the gulf between the days when truly might was right, and the days when, as we fondly believe, right is right. There are perhaps few, if any, among the *nomina juris* of Scotland presenting a more interesting or complete history than the word "dispone," and we shall endeavour from the pages of the Institutional writers and of the Reports to show how its power was more and more recognised, until the Legislature was called upon to interfere and sweep away what was not merely an anomaly but a serious obstacle to the free transmission of land from one citizen to another. It has lived and it has died, so that the inquiry we are entering upon and the legal tale we have to tell must perforce be historical and of the past rather than instructive for any future reference or consideration.

To begin with a few remarks on the word itself, we find on turning over the pages of Macpherson that on one occasion Lord Ardmillan gave a very interesting account of its etymology. We learn that "dispone," though not exclusively Scottish, is by derivation and in its grammatical connection and force really identical with the English term "dispose" in that sense in which "dispose" has an active force and means to bestow. This active verb does not require the preposition "of," but is used all alone; indeed it was pointed out by his Lordship that "dispose of" is equivalent to "make disposal of," and probably is a linguistic peculiarity of French or Norman origin, such as may also be observed in the common but inaccurate expression, "I accept of your offer." In the particular case in which this judgment was delivered the point at issue

turned upon the fact that in the prohibitive clause of an entail the letter "n" of the word "dispone" was written upon an erasure which subsequent careful inspection proved to have been originally occupied by an "s." Accordingly, when explaining the identity of the two words, Lord Ardmillan further went on to remark that in the original Latin word from which both "dispone" and "dispose" are derived, some of the derivatives give us the "n," as in "dispono," others the "s," as in "disposui," and also that many words with a similar derivation show compounds having one root: thus, exponent, exposition; component, composite; compound, composition; propone, propose, proponent; or, best perhaps of all, "depone," the well-known Scottish legal term for giving evidence upon oath, where the English use the equivalent "depose." It may be interesting to give, in the words of the learned Judge himself, further illustrations of words both originally derived from the Latin, but the one direct and the other through the French: "For instance, the word 'secure' from 'securus,' and 'sure' from the French 'sûr;' 'separate' from 'separo,' and 'several' from the French 'sevrer,' to divide; 'fidelity' from 'fidelitas,' and 'fealty' from the old French word 'feal,' faithful, 'feante,' faithfulness."

So much for the word itself and its grammatical force. Let us now turn to the decisions and mark the progress of that which it were rank heresy to deny was one of the most entrancing beauties of our early law. More in his Notes on Stair (i. 158) points out that it will not be sufficient for the charter to express merely an intention on the part of the granter of disponing the heritage to the grantee, there must be a dispositive act. Reference is made to the early case of *Ogilvy* v. *Mercer* (1793, M. 3336), where the case as stated in the rubric would appear to have turned merely upon the question of survivance or non-survivance for sixty days after the execution of a certain deed of entail. Further examination of the report, however, shows that after the reduction of this deed an effort was made to set up, as a conveyance of heritage, a deed, certainly not falling under the law of deathbed, but containing no dispositive words, and in a testamentary form, though there could be no doubt from the expressions used that Mr. Mercer intended to give the estate to his sister, whom he described as "the first heir appointed to succeed me." The Court, however, held the deed ineffectual as a conveyance of heritage. It was deemed to be not a question of *will* but of *power*. The mere intention to dispone, however clear, would not suffice without the technical word; there must be an absolute and *de præsenti* disposition, as, without this, at most the conveyance can merely impose on the granter an obligation to execute a deed apt for the purpose. In another case (*Duke of Hamilton* v. *Douglas*, M. 4368) a faculty of appointing heirs had been reserved, and it was maintained that in the exercise of such a power no *verba solemnia* were necessary, provided the will of the person could be ascertained from any authentic deed,

such as a deed of revocation then produced. That contention, however, failed entirely.

It must be remembered that in all deeds the dispositive is the ruling clause, and accordingly, should there be any discrepancy between this and any other portion of the deed, we know to which it is right to turn for guidance as to the true destination of the property.

The first authority to which we propose to refer is the case of *Mitchell* v. *Wright* (1759, M. 8082), and it is mentioned because, so far as can be seen, the Judges then for the first time laid down absolutely the principle that dispositive words were, if used *habile*, to convey heritage in a testament. "It is now understood (though it was not so anciently) that a man may effectually convey his heritage in his testament, reserving his liferent and a power to alter, provided he uses the *verba de præsenti*, such as 'give, grant, or dispose,' and not 'legate or bequeath.'" The reference here made to former doubts on the subject may be to the case of *Simpson* v. *Barclay*, decided in 1752 (5 Br. Suppl. 794), of which Lord Braxfield in 1796 said: "I am very clear it was ill decided. I am for preserving the purity of our conveyances, and I have always endeavoured to preserve it." The declaration contained in a codicil in Simpson's case was an indication of will, and was held effectual, but this was, as subsequently laid down, a judgment of which the law could not stand. "*Titius heres esto*," said Lord President Campbell in another similar case, "was good Roman law but bad feudal law."

More and more distinctly as we advance is the principle established that this word "dispone" is a *vox signata*, and must be used. In the case of *Galloway* (Jan. 12, 1802, F. C.), the words, "I hereby assign, transfer, and make over," although undoubtedly *de præsenti* words, were held ineffectual to convey the heritable property. Certainly there were also other reasons for doubting the efficacy of the conveyance, but the Court "were satisfied that the proper terms of conveyance were not used." In *Stewart* v. *Stewart* (Nov. 16, 1803, Hume, 881) again an effort was made to break through this terrible barrier, and it was urged that the whole distinction between what had been held good and what had not was a mere quibble, as indeed it was, but inexorable was the Court: "The case could hardly be said to be open to any difference of opinion. Our whole system of settlement of heritage continues to rest on the *notion* of an immediate conveyance, *and no other sort of phrase, how clear soever as an expression of the party's will*, is sufficient to make amends for the want of the dispositive words *de præsenti*." The italics are our own, as we emphasize the words of a great Judge, who is so thirled to a certain and technical form of expression that he feels impelled to adopt a "notion" while putting aside a clear intention, and rejecting words even of themselves clearly those of gift or bestowal in favour of the

one *vox signata* by which an arbitrary rule had decreed that the gift or bestowal should be indicated. If we pass on to the case of *Hamilton* v. *Macdowal* in 1815, the tale is the same, though the judicial expressions are even stronger. "If there is a word in Scotch law language which is technical, it is the word dispone. There are very few technical expressions in the law of Scotland, but there are some which have been held essentially necessary in order to give effect to some kind of deeds. *Dispone* is one of them, and is held to be necessary in all conveyances of heritage. I remember once, when at the Bar, of attempting to show that the essence of all such conveyances lay in the use of *verba de præsenti*, as distinguishing them from wills, which are expressed in *verba de futuro*, and that it was of no consequence what the words employed were. That was my argument, and I laboured hard to make out that *give* and *grant* were quite enough, but it would not do. I lost the cause unanimously. The word *dispone* was held to be quite technically necessary, and I was not listened to. I take it that in all conveyances from one person to another *a me* and *de me* the word *dispone* is requisite."

Ample in these authorities was the confirmation given to the great institutional authority for his two *dicta* on the subject:—

"There can be no destination of heritage in the form of a proper testament by the usage of Scotland."

"The reasons assigned by our writers why heritable subjects cannot be devised by testament are: *First*, That by the genuine feudal rules the investiture of lands ought not to be altered without the superior's consent; which consent of the superior the law has not required as essential to a vassal's testament. *Secondly*, That heritable rights require seisin to perfect them; and testaments do not admit of seisin."

In the case of *Maclaine of Lochbuy* (June 23, 1807, F. C.) an entail contained in the prohibitive clause the words "dispose of" instead of "dispone," but the force of these words as being the equivalent of the *vox signata* does not seem to have been disputed. Again, somewhat later, in *Lang* v. *Lang*, also an entail case (Nov. 23, 1838, 1 D. 98), the words used are "dispose upon," and so far as can be seen from the report the question was not raised, it being apparently conceded that these were "dispositive words." No doubt in Lang the judgment was reversed subsequently in the House of Lords, but that reversal proceeded on different grounds, and did not affect the point we are considering. In 1845 the case of *Dewar* v. *Burden* was decided. There the prohibitive clause of the entail declares that it shall not be lawful "to sell, annailzie, wadset, *dispone*, or impignorate the lands, or do any other deed for *disposing upon* or affecting the said lands and estate." While the irritant clause bears, that "if any of my said daughters and their heirs succeeding to me shall contravene or fail in performance of any of the provisions and conditions above written, or alter the

order of succession above set down, or *dispose* upon and affect the said lands," etc. We have thus in one deed both "dispone" and "dispose upon" used as synonyms, and the validity of the entail with this peculiarity was sustained not only in the Court of Session, but on appeal by the House of Lords. None of these authorities, however, present an example of any really serious attempt to draw closer the lines around the sacred word, but it was reserved for lawyers of yet more recent times to make such an effort. In *Glassford's Trustee* v. *Glassford* (July 7, 1864, 2 Macph. 1317), the case in which Lord Ardmillan's remarks upon the etymology of the word "dispone" have already been mentioned, it was sought to reduce a deed of entail because in the prohibitory clause against selling, wadsetting, or disponing the lands, the letter "n" in the word dispone was written upon an erasure, and through the letter "n" the letter "s" which filled the space could easily be traced. No doubt the attempt failed on the ground that the vitiation was not *in essentialibus*, but opinions were expressed that had the erasure occurred, and the word been shown to be *dispose*, in the dispositive clause, and not *dispone*, technicality must have prevailed, and the *nomen juris* would have again triumphantly vindicated its right. Six of the consulted Judges, in returning a joint opinion, clearly showed what their views as to this matter were. "We wish," they said, "to guard against its being supposed that we should take the same view in a clause of a different description. In the dispositive clause of a deed or settlement regarding heritage, the use of the word 'dispone' is essentially necessary as a technical term, for the purpose of constituting a conveyance. The word 'dispose' standing by itself, would not, in our opinion have the same effect. If, therefore, in the dispositive clause of a deed the word had been originally 'dispose,' and had then been altered by erasure or superinduction to 'dispone,' we are not to be understood as holding that the deed would be good. The word 'dispose' is a wider and more general term than 'dispone.' It would not, we think, import the precise solemn act of conveyance implied in the word 'dispone,' and would therefore not be an equivalent for the proper technical term where 'dispone' was essentially necessary." And so, as lately as 1864, the Court was binding itself hand and foot to this technical word, was rejecting usual and discovering unusual meanings or force in the verbs of our language, and was placing the last log upon the funeral pyre of *de præsenti* conveyances.

Only four years later and we find the Legislature interposing to correct that which had been suffered to grow into an abuse and scandal to the law, and an Act was passed (31 and 32 Vict. c. 101) intituled 'Titles to Land Consolidation (Scotland) Act, 1868,' whereof the twentieth section is in these terms: "From and after the commencement of this Act it shall be competent to any owner of lands to settle the succession to the same in the event of his death,

not only by conveyances *de præsenti* according to the existing law and practice, but likewise by testamentary or *mortis causa* deeds or writings, and no testamentary or *mortis causa* deed or writing purporting to convey or bequeath lands which shall have been granted by any person alive at the commencement of this Act, or which shall be granted by any person after the commencement of this Act, shall be held to be invalid as a settlement of the lands to which such deed or writing applies, on the ground that the granter has not used with reference to such lands the word 'dispone,' or other word or words importing a conveyance *de præsenti*: and where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain with reference to such lands any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the granter, or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing, if executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be deemed and taken to be equivalent to a general disposition of such lands," etc. etc.

It may readily be supposed that the passing of this Act has practically closed the adventurous and, to a lawyer at least, interesting history of the word "dispone," but there are yet three cases which have been decided since 1868, to which reference must be made if we are not to leave our story imperfect. The first of these is *Pitcairn* v. *Pitcairn* (Feb. 25, 1870, 8 Macph. 604), where the point turned on the interpretation of the clause of the Act already recited. David Pitcairn left a will, in which he declared that "Hope Pitcairn, my brother, shall not inherit any of my effects, but that they shall all descend to my brother, John Pitcairn." The question came to be, whether "effects" included heritable property in the sense of 31 and 32 Vict. c. 101, sec. 20, and it was unanimously held that it did not, and that consequently the heritage passed to the heir-at-law. The writing did not relate to lands as contemplated in the section of the Act, and consequently the clause did not apply, and the Court refused to construe "effects" in such a context as including landed property. The second case turning upon the same clause of the Act is that of *Hardy's Trustees and others* (May 13, 1871, 9 Macph. 736), which came before the Second Division in the form of a special case. The testator had appointed trustees "to do everything necessary for the comfort of my wife and family; that they entirely take charge of the farm, all means and moveables, until the youngest is twenty-one years of age, then to be an equal division. . . . And they also have power to take it from the one and give it to the other in case of any imprudence. . . . The whole arrangements are to be wholly through the trustees. They shall also have power to retain or give up the farm as they see it of most advantage to the family."

The Court unanimously held that this deed carried to the trustees the lease of the farm, and we cannot refrain from giving one or two trenchant sentences from the opinion of Lord Neaves, who said: "The recent Act of Parliament was passed to remove a great blot and unreasonable restriction by which the word 'dispone' was necessary to carry heritage in a settlement. I am glad that in Pitcairn the Court recognised the true nature of that enactment, which is that which I have mentioned. But a deed must still purport to carry heritage, and the only difference is that it is no longer a question of technicality but of common construction whether heritage is to be carried or not. Thus the word 'effects' was found not to carry heritage, because in common parlance 'effects' does not mean heritage."

Last of all we have to refer to the case of *Kirkpatrick* v. *Kirkpatrick's Trustees* (March 19, 1873, 11 Macph. 551, reversed, but on another point, H. L. 1 R. 37). What really gives a special interest to this case in relation to the subject of which we are treating is that here for the first time we find the House of Lords considering the question of the former necessity for the technical word, and deciding authoritatively that it was necessary. Not until some years after the Act of 1868 had abolished the *vox signata* did that very word receive from the highest tribunal in the land full recognition. The Lord Chancellor tells it all in a few words, not perhaps without sarcasm:—

"The later deed of 1867 has not in it that word of art and style of such efficacy according to Scotch law, I mean the word 'dispone.' . . . It was your Lordships' opinion, after hearing all they had to urge against it, that looking to the unanimity prevailing in the Court below upon this question, looking to the decisions which from time to time have been arrived at, and the *dicta* which have fallen from judges in Scotland upon the subject, looking to the expressions of text-writers as indicating the opinion and practice of the profession, it would be impossible now to open or disturb the question as to the necessity for this word 'dispone' in a conveyance of heritage. It may appear to be a very technical view to hold the presence or absence of a single word of this kind to be efficacious or fatal in a deed conveying heritable property, but your Lordships must bear in mind that according to the law of England also there are other words I apprehend not of greater importance, the presence or absence of which will be found to have an equal effect on the validity of a deed in this country."

Such, then, is the sum and substance of our tale; this singular word, born it may be in a monkish cell, or in the fusty recesses of some lawyer's office, grew by slow degrees into a robust youth. Courts of law trembled at its appearance, or bemoaned its absence, till, as time passed on and it reached a hardy manhood, all fell down before the idol of jurisprudence: judges acknowledged its sway, counsel either bowed before its shrine or shrunk away to avoid inevitable shame; agents worshipped it at the altar of Mammon. And so it triumphed daily, yearly stronger, swallowing up its adversaries, sweeping all before it, till the fell day of retribution came, and stern statute said, "Ye shall dispone no more." We

may hang a criminal and thus wipe him out, we may even bury him at the cross-roads, with a stake through his body to keep his ghost from walking, but the wraith of a *vox signata* cannot be so laid, and there yet stalks as a phantom in our law the semblance of that word "dispone."

NOTES IN THE INNER HOUSE.

The case of *Green* v. *Chalmers* (Dec. 17, 1878, Second Division) is chiefly important for the able opinion expressed by Lord Young in recording his dissent from a view taken by the majority of the judges deciding it. It was an action of damages for slander brought by a gardener against a lady who was a neighbour of his master. It was alleged by the pursuer that the defender had accused him of having stolen articles from his master's house. She had done this, it was said, to the police constables. The defender denied that she had ever done so, and at the same time took the plea of privilege. The Sheriff, evidently treating it as a simple case of slander depending upon proof of the facts alleged, seems to have quite overlooked the question of privilege raised, and decided against the defender, assessing the damages at £20. In the Court of Session Lord Ormidale (with difficulty) was prepared to hold it proved that the alleged accusation had been made by the defender, but then "it must be kept in view that it was made to officers of the law who had gone to the defender for the very purpose of receiving complaints." Such being the case, he was prepared to extend to this statement that shield of "privilege" which protects information given to every limb of the law from the Lord Advocate down to a constable; accordingly, finding no averment or proof of malice, and want of probable cause, he was prepared to assoilzie the defender. In this view Lord Gifford concurred. Lord Young also held that the action was unfounded, and that the defender must be assoilzied. But he arrived at this conclusion by a somewhat different road. "I am, I confess," he said, "perplexed about the form and even substance of the judgment by which your Lordships propose to attain that result." And again, "The case is of the pettiest, but I must nevertheless respectfully offer my protest against your Lordships' view of the law applicable to it." Upon the question of fact he was prepared to hold that the alleged slander was not proved. He concurred with his brother judges that, assuming the defender had made the statement averred, it was in the circumstances privileged, "so as to repel the inference or presumption of falsehood and malice and put the pursuer to the proof of them. I should further concur in holding that although the charge was shown to be false and malicious, the defender must nevertheless

go free if it appeared that there was probable cause for it." But then upon the assumption that the statement had been uttered, the next question would be, Was it a false charge which the defender had made? And here he differed from his brethren; for, "the evidence being all one way, with not even an averment or suggestion to the contrary, the conclusion must be that the charge was false in fact, and so accordingly, *ex debito justitiæ*, the Court must find." As for the malice, which the pursuer would also be bound to prove in a case of privilege, Lord Young thought he would be entitled to rely, not merely on the fact that the charge was made and that it was false, but also on the fact that the defender had not even alleged any reasonable or probable excuse for making it. She had denied it simply. But then the Court had rejected that denial as false. "Here your Lordships propose to affirm the injurious falsehood, and I venture respectfully to ask whether you mean also to affirm that there was reasonable excuse for it? The author of it alleges none, and indeed says positively that she has none, making no other defence than that which your Lordships reject as false, viz. that she is not the author. To reject her denial of the calumny imputed to her, and at the same time to credit her with probable cause or reasonable excuse for it, which she utterly repudiates, is a result so amazing to our mind that I must express my dissent quite distinctly." If the defender had not made the charge, she had no occasion to claim the protection of privilege; if she had, it was false and malicious, and she could not have that protection.

These remarks of Lord Young appear to constitute a bold commmon-sense and, we may add, characteristic attack upon a slavish regard for the rules of pleading. This appears more clearly when he goes on to say: "That malice is not averred on record is, I think, immaterial. It may be, and habitually is implied, when a false and calumnious slander is imputed. Malice is, indeed, of the essence of all slander whether privileged or not." He makes two remarks upon the distinction between privileged and unprivileged cases: "The only distinction is that it is implied in the one class of cases, and is only displaced by proof of the *veritas*. It must be proved in the other when the implication is repelled in the first instance by the privilege. The distinction between privileged and unprivileged cases truly resolves into a question of presumption and *onus*."

In *Martini & Co.* v. *Steel & Craig* (Dec. 18, 1878, First Division) we find an exception recognised to one of the principles of mercantile law. That principle we may state in the words of the Sheriff (Clark): "When a bill is left for acceptance with a drawee by an indorsee, he is bound, if he does not choose to accept, to return the bill, so that the indorsee may have his claim against those whose names are previously on the bill, and particularly against the drawer and the immediate indorser." In this case a bill was

drawn upon and sent to Steel & Craig, a Glasgow firm, by that of Butters & Co., Canada. It was indorsed to a second Glasgow firm, Athya & Co., by the drawers, but instructions were sent not to deliver it to these indorsees except upon exchange by them of an equal amount of free bills. Mr. Athya applied to the parties to whom it was then sent for the bill, and was told the condition upon which it was to be delivered up. He asked leave to take it to his office and got permission to do so. He then refused to comply with the condition imposed by the drawers, and also declined to return it to Steel & Craig. On the contrary, he indorsed it to Martini & Co., intimating, however, to them the condition which his own firm had not complied with. In this way the bill came again into the hands of Steel & Craig, being presented for their acceptance by Martini & Co. Steel & Craig refused to accept it until the exchange of free bills had been made, and they also refused to give it up again. Martini & Co. then came into Court seeking delivery of this bill. In the Sheriff Court they were successful, the Sheriff applying the principle above quoted; but in the Court of Session the defenders prevailed. The bill had originally got into Mr. Athya's hands improperly, and the Court held this fatal to the pursuers' claim, who had got it from him, no doubt for value, but knowing the fact of the condition imposed by the drawers. As Lord Deas observed, "it is an important and sound principle in our law that if a man gets a document, either for a specific purpose or upon a specific condition, he must either fulfil the purpose or implement the condition, or else restore the document."

In the cases of *Roger* and *Simpson*, appeals from the Sheriff Court of Aberdeen and Kincardineshire raising the same question (Dec. 21, 1879, Second Division), the Court have decided that a farm labourer's settlement was in a parish in which he had a house where his wife and family continuously resided, although he himself only returned home for the Saturday or Sunday every two or three weeks. In giving judgment the Lord Justice-Clerk observed: "I think that if a man maintains a house where his wife and family reside, and whither he returns when his avocations permit, that house is in general his residence in the sense of the Poor Law Act. . . . To hold that a man resides where his wife and family are, is, I think, the general rule, though there may be cases to which it does not apply."

Reviews.

The Position of the Fiars Prices. By NENION ELLIOT, S.S.C., Clerk and Extractor of Teind Court. Colston & Son, Edinburgh.

ALTHOUGH this pamphlet has been printed for private circulation, the importance of the subject as well as the position of the writer

fully justify us in again calling attention to the subject of Fiars Courts. We lately (xxii. 482) had occasion to notice a publication by Mr. Hector, Sheriff-Clerk of Renfrewshire, on this subject. His suggestion was the "improvement by legislative means" of the Fiars Courts. Mr. Elliot, on the other hand, undertakes to show that the striking of fiars prices is now unnecessary. On the assumption that this can be made out, all the difficulties and requisite changes which have occupied the attention of the lawyers mentioned by Mr. Elliot (Appendix, Note A) would disappear.

Although not so succinctly put as might be wished, Mr. Elliot's argument as to there being *now* no necessity for fiars prices is based (1) on the fact that the object for which the fiars prices began in a remote antiquity to be struck by the Sheriffs of Scotland was different from that for which they now exist; and (2) that the only objects for which fiars prices are now required being the ascertainment of ministers' stipends and a few rents, could be much better served by the ascertainment of prices from the registers of a few public markets over the country.

The first of these positions is undoubted, and a *résumé* of Mr. Elliot's argument in support of the second we cannot give better than in his own words:—

> "As a statement of prices which have been current during any one year, the fiars are of no value. They are not the prices that have been current, neither are they, taking one county with another, to be relied on as the proportionate value of each county, because each county deals with its fiars prices in its own manner. If it were desired to keep a record of the real prices current, that object could be attained by the officer of every market keeping an account of the sales, and these could be made up into tables showing the results for any period, whether weekly, monthly, or yearly, as may be desired. It is only necessary to refer to the 'Tables respecting the Supply and Sales of Grain in the Edinburgh Corn Market,' the last series of which, for the nineteen years to 28th August 1878, were issued last year, as an example of what can be accomplished in the shape of keeping a permanent record of market prices."

We quite agree with Mr. Elliot that he has here found a practical solution of this matter in districts where such market prices are available. But what of counties such as Sutherland, Caithness, Orkney and Shetland, where no such data are available? The fairest and best way to ascertain prices for the whole of Scotland, seeing that improved communication has so equalized them, would be for an average to be struck of the market prices at Edinburgh, Glasgow, Dundee, Aberdeen, Inverness, and Tain. This, however, would require to be done officially; and as the Crown at present bears the expense of Fiars Courts where they have rents depending on fiars prices, it would appear reasonable that the official report should be made up in Exchequer, and should be exposed for objection by any party interested for a month, and thereafter to be settled and fixed by the Sheriff of Edinburgh. But these are minor details, and will be easily adjusted once Mr. Elliot's proposal is accepted by the public. That it may be fairly discussed is our

earnest hope. And meanwhile the thanks of the public are due to Mr. Elliot for his timely and valuable suggestions—one of which, and that not the least important, is that his scheme "would greatly facilitate teind business and make it more intelligible." The Teind Court is the only unreformed legal institution we possess, and its delays are proverbial. Mr. Elliot is content to put this blame on the calculations—intricate in most cases—which have to be made at the Teind Office. This is very chivalrous of him, but we know that common and other agents are not free from blame. "Since the Act of 1808," he remarks, "was passed the complaints of delay and expense have been numerous and serious, and while at present the delay is being reduced, it cannot be denied that the calculations have contributed to these grounds of complaint. There are many evidences of this. A conversion into money, therefore, would greatly facilitate teind business and make it more intelligible."

Mr. Elliot would only be doing a duty by the public were he to expand his pamphlet in the direction of making it less technical, and publishing it. He would thus interest persons beyond the profession in the evils which he shows to exist, and which it is to be hoped will not be longer allowed to exist unremoved. The present Lord Advocate held out some hope that he would enter the lists of his country's benefactors by some movement in this direction; and as his Lordship is now allowed by the indefatigable Home Secretary to do so little of the work which fell to his predecessors in office, he might find in teinds not only occupation but a subject with which even Mr. Cross would not presume to interfere.

The Law and Practice under the Companies Acts, 1862, 1867, 1870, *and* 1877; *and the Life Assurance Companies Acts,* 1870 *to* 1872: *containing the Statutes, with the Rules, Orders, and Forms to regulate Proceedings in the Chancery Division of the High Court of Justice and the County Courts, and on Appeals from the Court of the Vice-warden of the Stannaries.* By H. BURTON BUCKLEY, M.A., of Lincoln's Inn, Esq., Barrister-at-Law and Fellow of Christ's College, Cambridge. Third edition. London: Stevens and Haynes, 1879.

IN the third edition of this useful work Mr. Buckley has added to the decisions quoted by him in former editions the more important cases which have been recently determined, and a knowledge of which is essential for the right understanding of the various statutes affecting public companies. A glance at the long table of cases is sufficient to prove the necessity for a work of the kind, and to indicate the important help which is to be obtained from its pages. Few Acts have undergone such minute and searching

criticism as the Companies Acts, and the satisfaction with their working is due not less to the care and precision with which they have been drafted, than to the anxious consideration which the Courts have given to the numerous questions which have arisen as to the interpretation and application of their provisions. It is often supposed that the codification of the law would lead to the diminution of lawsuits. The experience derived from the working of the Companies Acts would lead to a contrary opinion. Notwithstanding the accuracy of the language employed, and the wide scope given to the various enactments, the points which have been raised for judicial settlement have been no less important than numerous; and as one turns over the pages of the English Law Reports, one finds no falling off in the number of such questions. In the Scottish Courts, until recently, comparatively few questions under these Acts have arisen; but the mercantile disasters of the past year have produced a large crop of litigations in which the meaning and bearing of several of the leading clauses of the Acts have been under judicial consideration. The large discretion which, especially in the part relating to the winding up of public companies, has been conferred on the courts of law will always render the Companies Acts a fruitful occasion of litigation, apart altogether from the strictly legal questions which arise out of their enactments. In both classes of cases the Acts alone no longer form, or rather never formed, the whole law on the subject with which they deal; and to the practising lawyer the labour entailed by a comparison of the clauses of the Acts with one another, and with the judgments of the Courts, is daily increasing with the increase of decided cases. This labour Mr. Buckley's book lightens in no small degree. The mere arrangement of the leading cases under the successive sections of the Acts, and the short explanation of their effect, are of great use in saving much valuable time, which would be otherwise spent in searching the different digests; but the careful manner in which Mr. Buckley has annotated the Acts and placed the cases referred to under distinct headings, renders his work particularly useful to all who are required to advise in the complications in which the shareholders and creditors of companies frequently find themselves involved. The notes are directed not merely to the expiscation of the meaning of the several clauses, but also to the explanation of the common law on the subject with which the particular section is concerned. Thus under section 30, which limits the effect of giving notice of trusts, we find a concise statement of the English law relating to the liability of trustees, prefaced by some remarks on the difference between the wording of the clause in the 1862 Act and of the similar clause in the Act of 1856, the effect of the change being apparently to affect companies with notice of the trust in a question between the trustee and the beneficiary, but by forbidding any such entry in the register, and deprives the notice of all force in limiting the liability of trustees

in questions with creditors and shareholders. It is somewhat strange that the clause placing the English law on the same footing in regard to trusts as the Scottish law was held to be in *Lumsden* v. *Buchanan* should be expressly limited in its application to England and Ireland, and no reason for the exclusion of Scotland from its operation is suggested by Mr. Buckley. The Legislature may have intended to imply that while in England trusts should not be recognised so as to limit the liability of trustees in a question with creditors, the same rule should not be laid down for Scottish companies. In treating of the extent to which a company may obtain payment from the beneficiary of calls in respect of shares held in name of a trustee who is entitled to be indemnified by him, Mr. Buckley defines the liability as limited by the depth of the beneficiary's pocket, and not by that of the trustee; but the cases quoted render it doubtful whether he ought not rather to have said "the depth of the trustee's pocket *plus* that of the beneficiary's."

The cross-references will be found very useful, as well as the numerous references to cases not reported in the Law Reports, and specially to the decisions of the learned arbitrators in the "Albert" and "European" arbitrations. It would have been well, however, if the amount of respect due to the decisions in these arbitrations had been stated so as to avoid confounding them either with ordinary judicial determinations or with the results of common arbitrations. These decisions do not form precedents to which in England courts of law are bound by their traditions to bow; but neither are they to be wholly neglected, for, following the opinion of Lord Selborne, the decision of a judge in whose capacity the Legislature had so great confidence as to give him for the special purpose of these cases an authority paramount to the ordinary courts, is entitled to weight similar to that attached to the opinions of writers of authority. It ought also to be borne in mind that, according to Lord Westbury, while the Legislature had given to the arbitrator right to decide according to what he might think just, it was a "right not to be followed except in cases where the claims of justice wholly and entirely overbore what would be dictated by the decisions." The Index, always an important part of a law-book, is full and well arranged.

The Conveyancing Code; being the Scotch Acts relating to Conveyancing and Registration. With full Explanatory Notes appended to each Section and Schedule. By J. HENDERSON BEGG, Advocate. Bell and Bradfute, Edinburgh.

THIS valuable book comes rather too late to hand to admit of very

full treatment at our hands in this month's issue. It is, however, too important a contribution to our legal literature not to merit the notice which our limited space affords. It, along with the other works to which our recent conveyancing legislation has given birth, has been demanded by the new character impressed on Scottish conveyancing. Formerly it was a grand historical study. As the most perfect remains of that feudal system which had such an influence on the society of Europe—not to say on the race—Scottish conveyancing had an educational influence of much the same character as the study of the languages of Greece and Rome. It is only because we fear that such books as Mr. Begg's will lead our future law students to attempt a shorthand method of studying our system of conveyancing that we hesitate to welcome them. And it is Mr. Begg's only fault that he has stuck too closely to his text—the statutes—and not even indicated the old feudal principles underlying, and which alone can explain, the recent enactments. Take, for instance, the author's treatment of section 55 of the Conveyancing Act of 1874, repealing section 118 of the Bankruptcy Act of 1856. In this utilitarian age time is, however, too short for the modern conveyancer to consult in business hours anything which does not condense, as Mr. Begg does in this and other places. Let us only hope that at a leisure moment the modern conveyancer may find time to go to Ross's Lectures and discover that it is only because heritable creditors are, feudally speaking, proprietors infeft that they have right to bring an action of maills and duties, or poinding the ground. Mr. Begg, however, does not encourage such study by even giving a reference to any such old-world book, and merely contents himself with a statement of the modern law as settled by a decision as to the effect of such diligence, and then assuming that "the common law right" is thus "above explained."

Our author is under the necessity of treating of the conveyance of moveable as well as heritable property, because the statutes he has so well—although with too brief explanations—codified embrace provisions as regards both kinds of property. These provisions should, for the sake of the study of our law as well as that of the practitioner, have been embodied in separate Acts of Parliament. Mr. Begg is of this way of thinking, although he puts it very mildly thus:—

> "The title and the preamble of the Act refer merely to heritable property and heritable rights. But the meaning of the subsequent enacting clauses, where clearly expressed, is not limited by the language of the title and the preamble. Thus section 149, which permits tested documents to be partly written and partly printed, expressly relates to 'all documents whatever, mentioned or not mentioned in this Act, and whether relating or not relating to land;' and section 139, which declares females of the age of fourteen or upwards to be competent witnesses to deeds dealing solely with moveables (*Hannay, etc.*, 1st Dec. 1873, 1 Rettie, 246)."

The only justification of this mixing up of moveable and heritable ·ʰts may be the provisions of section 20 (not covered by the

preamble of the Consolidation Act of 1868), which, Mr. Begg cautiously states, "aims at the placing of heritable estate in the same position as moveable estate." It may be here noticed as curious that neither in the Consolidation Act of 1868 nor in Mr. Begg's "Code of Conveyancing" (moveable as well as heritable) is the "Act to facilitate the Transmission of Moveable Property in Scotland," passed on 7th August 1862, noticed. The forms there instituted are brief and useful, but being permissive have not been allowed to interfere with the use of the old and verbose deeds and notarial instruments.

Leases—that is, the question whether they were to be embraced by a conveyance which omitted the magical word "dispone"—were long a source of discomfort to the judges, and the section we are now noticing has done much to relieve them. Mr. Begg (curiously enough in his *Errata*) introduces to notice another important effect of the Act as regards leases:—

"It is thought that section 117 of the Consolidation Act, rendering heritable securities moveable *quoad* the succession of the creditor, unless executors are expressly excluded, is applicable to securities over recorded leases: see interpretation clause, *voce* 'heritable security' and 'lands.' If this be so, the forms provided by the Consolidation Act for the completion of the title of executors to heritable securities may competently be used to complete the title of executors to bonds and assignations in security over recorded leases."

In fact the *errata* in this book are unusually valuable and suggestive, and if *they* be so, it is to be naturally inferred that our author's work will be so too. This deduction seems to be fully justified by the examination we have made of the work. Our author is not troubled, much less perplexed, by such anachronisms as the words "prior to the passing" of the Act, which he holds should be "prior to the commencement hereof." He adds, as justifying this boldness—for, as we have seen, he is elsewhere very cautious—"But the mistake is probably of no importance, as the proviso on which it occurs appears to be superfluous."

It would have been well had all the legislative curiosities in which, as regards the commencement of its provisions, the Consolidation Act of 1868 abounds had been of as easy solution. Some of these are noticed by Mr. Begg in his notes on section 2, and he not unnaturally calls attention to the decision in *Brown* v. *Macdonald* (28th Jan. 1870, 8 Macph. 439), where, notwithstanding the retrospective effect of many of the sections, section 117, which rendered heritable securities moveable as regards the succession of the creditor therein, was held not to have such an effect. It could not therefore (the Act only passed on 11th August 1869, but its effect commenced on 31st Dec. 1868) regulate the succession of a creditor who died intestate in June 1868, and whose heir-at-law died in January 1869 without having made up a title.

To the author of this work the legal practitioner cannot but be indebted. Our only wish is that Mr. Begg would undertake the

larger task of treating our Conveyancing Acts in their historical aspects. It would be one worthy of the services he has already rendered as a legal author, and of his standing at the Bar, and do a great deal to promote in the future a study of our conveyancing law, not as the creature of statute but the outcome and development of that feudal system which has had such effects not merely on the law but on the people of Scotland.

Obituary.

JOHN GIBSON, Esq., W.S.—This venerable gentleman passed away on the 31st of January, having all but completed his ninetieth year. Well known in the profession, he always bore a character marked by the strictest integrity and honour. He was admitted a member of the Society of Writers to the Signet in 1818, and at the time of his death his name stood third in point of seniority on its roll. No less esteemed in the private than in the public relations of life, his loss will be felt severely by a large circle of friends.

JAMES WEBSTER, Esq., S.S.C.—The death of the above gentleman took place on the 4th of February. Few men were so universally known in legal circles as Mr. Webster, who for many years was one of the most extensively employed agents in Edinburgh in connection with the conduct of litigation in the Court of Session. His talents were of no mean order, and he always did his work thoroughly and honestly, his cases being conducted in a spirit of fairness and forbearance, which without being in the least degree prejudicial to the interests of his client, contributed to raise him to the height which he attained in the estimation of his professional brethren. Mr Webster passed as Solicitor in 1839, but during the last few years has been almost entirely laid aside from business in consequence of failing health.

PATRICK SANDEMAN BEVERIDGE, Esq., S.S.C. (1850), died on the 14th of February. He was senior partner in the firm of Beveridge, Sutherland, and Smith, S.S.C., Leith, and was much respected in that town; he was elected a member of the Leith School Board on its original organization, and continued to hold a similar position down to his death. A man of widespread influence and sterling worth of character, his loss will be deplored by many who have had the privilege of his acquaintance.

THOMAS JOHN DUNN, Solicitor, Melrose.—The death of this gentleman is announced as having taken place at Melrose on the 6th of January. He was a local practitioner of considerable eminence, and attained a high position in the esteem of all with whom he came in contact, both for his business qualities and the excellence of his private character. We extract the following from a notice on Mr. Dunn in a local paper:—

"Mr. Dunn was born in London on the 18th of August 1813, and was thus in his sixty-sixth year at the time of his death. His early life was spent in Melrose, where afterwards for forty years he carried on a successful legal and banking business, along with his esteemed partner, Mr. Allan Freer, and he gained for himself an extensive and well-founded name for high intelligence, sterling principle, public spirit, and philanthropic zeal. In addition to his professional engagements as a lawyer and banker, Mr. Dunn held for thirty-six years the office of J.P. Clerk of Melrose district, which office he resigned four years ago, and was succeeded therein by his son, Mr. Ralph Dunn. He was a great political power in the Borders. As a Liberal he was staunch and thorough, and had the deepest conviction of the ultimate success of Liberal principles. In this connection he acted for many years as the Liberal agent for Roxburghshire and the Western District of Berwickshire. In many other respects Mr. Dunn took a foremost part in the political life of the Borders, and will in this particular alone be very much missed. Among the other public offices which he filled was that of Assessor of Income Tax for the district; he was also an active member of the Melrose Parochial Board and Local Authority, and a director in the Corn Exchange, Gas, Water, and other local companies.

"In private life he was singularly genial and sprightly, and in his home he dispensed a most generous hospitality. In business he was regarded by his clients not simply as their wise and faithful counsellor, but as their trusted friend. In everything that was likely to benefit the community in which he lived, Mr. Dunn took an active and a leading part. As a member and office-bearer of many years' standing in the United Presbyterian Church, he was a sound and consistent Voluntary, yet this was allowed in no way to interfere with his tolerance of those who differed from him, and never prevented him from lending a helping hand to whatever cause was good and worthy of itself. As a United Presbyterian, he took a very deep interest and a very active share in all the work of his denomination. He stood forth as one of its foremost office-bearers, and with his ready pen and weighty counsel he was ever desirous to increase its usefulness."

As a proof of the esteem in which Mr. Dunn was held, we may mention, that at the desire of numerous friends, his funeral, which took place on the 11th January, was a public one, and was attended by a large assemblage of persons anxious to pay a last tribute of respect to the deceased.

JOHN SWAN MILLIGAN, Esq., S.S.C. (1867), died on the 21st ult.

The Month.

The recent Bank Trial.—This case has been so thoroughly discussed of late by the public press that we do not at present mean to inflict on our readers any remarks on its legal aspect. We may mention, however, one circumstance that has struck us forcibly: having been reported pretty fully in many English papers, one effect of the trial has been to bring home the fact to a vast multitude of our Southron friends that Scotland is not a barbarous country devoted altogether to the pastimes of dancing reels and drinking whisky-toddy, but has legal machinery of its own, administered in a different manner from that which prevails in England. We are sure that we are not exaggerating the fact when we say that until lately thousands of well-educated and intelligent Englishmen were in total ignorance that this was the case. We have been somewhat amused by the many blunders which the press has made over the late trial. To some of these we shall allude presently; but in the meantime we may say, that if our own Scottish members of Parliament make the most astounding statements in regard to the executive power of Scots law, we need not wonder at newspapers falling into some comparatively trivial mistakes. But surely we have a right to be surprised when we read of a Scottish M.P. gravely assuring his constituents that the thanks of the country were due to the Treasury for the prompt manner in which the bank directors were arrested! It is almost incredible that a gentleman representing a Scottish constituency in Parliament should be so amazingly ignorant of the way in which law is administered in North Britain. The statements of the newspapers, however, are more pardonable and infinitely more amusing. One paper assured its readers that the reason why the Lord Justice-General did not preside at the trial was because his Lordship was a relation of one of the prisoners; and the following delicious statement was made in the columns of a largely circulated weekly: "It is whispered that the existence of an ancient but unrepealed law, according to which theft is punishable with death, has something to do with the withdrawal of these charges (those of theft and embezzlement); but the reason given by the Lord Advocate was that he considered there were insuperable difficulties in the way of establishing them to the satisfaction of a jury." One of the London daily papers announced that on Sunday the jury had been taken a drive in the vicinity of Glasgow, which we are afraid was rather more than "a Sabbath-day's journey" from the precincts of the High Court of Justiciary. One would have thought that the illustrated papers, having only to depend on personal observation, were likely to be correct; but no! in the *Graphic* appeared a clever sketch of the Court-house, faithfully enough

portrayed in most respects; but the jury-box was represented as having only twelve occupants: the English mind of the artist naturally took it for granted that a jury could not possibly consist of any but that mystic number. The soul of the Dean of Faculty must indeed have been vexed within him when he beheld, in a picture of the Parliament House, all the counsel represented as wearing frock-coats and coloured ties. Shades of erstwhile stern observers of Bar etiquette, to whom the enormity of wearing the most innocent of grey trousers during session was an unpardonable offence, savouring of levity of character and inattention to business, has it come to this! that the appearance of your degenerate and unworthy successors should make so little impression in the careless eyes of a roving artist, as that they should be represented in such an unprofessional garb?

This levity, however, is not for the sober pages of the *Journal of Jurisprudence.* The trial is indeed a sad subject, though even it has a grotesque side. We will conclude these notes by reproducing, word for word, one of the most amusing of the kind of statements we have been considering. What renders it especially funny is the fact that it is given from one of those oracles who write the gossip paragraphs in the so-called "Society" Journals. It is sad to think that such an omniscient man is caught tripping, especially in so simple a subject as Scottish law; but we think, that of all the comments upon and information about the late trial, none are so utterly nonsensical as the following: "Some surprise is felt that the sentences on the Glasgow Bank directors have been so lenient. According to English law," writes this compendium of legal wisdom, "they might have been condemned to five years' penal servitude for the offences of which they have been found guilty, *but according to Scotch law they could only be condemned to two years' imprisonment as first-class misdemeanants"!*

It must not be inferred from the above remarks that we do not appreciate in the highest degree the general care, accuracy, and patience displayed by the representatives of the press, both English and Scottish. It only shows that the intricacies of the law of any country cannot be mastered off-hand.

The Sentence in the late Bank Trial.—We extract the following from a recently started periodical, *The Scottish Banking and Insurance Magazine.* The remarks are, we think, deserving of attention, especially in view of the strictures which have been somewhat indiscriminately heaped upon the sentence by a large proportion of the newspapers of the day:—

"It is far from our purpose to mitigate the offence of the City of Glasgow Bank Board. Justice and truth and honesty require that their offence should be unmistakably condemned, and that the punishment meted out to it should be full and adequate. Yet the current into which much of the talk regarding

the sentences pronounced by the Court has flowed, compels us to protest against a tendency to declaim against those sentences as too lenient. No one who was present in the Court during the trial has joined in condemning the sentences on the ground of leniency, and for a very obvious reason. It is not mere sentimentalism to say that no sadder spectacle has been seen in the High Court of Justiciary than that row of seven grey-headed, broken-down men, who for twelve days sat out the greedy gaze of the crowded court-room. The *rationale* of criminal law is not revenge, but deterrence, and our form of indictment bears that the accused 'ought to be punished with the pains of law in order to prevent others from committing like crimes in all time coming.' If punishment were the object, what could have been imposed upon men whose deeds had not only stayed the very chariot-wheels of progress in Scotland, but brought desolation into thousands of happy homes, and even death into some? Seeing that the question of vengeful punishment cannot, then, be entertained as regards the results of their crime, surely there was a powerful deterrent of such crimes 'in all time coming' to be seen in the mere appearance of these men in such a place. There is an infinity of sadness in the thought of who they were and what they had been. Stewart, honoured and esteemed by all who knew him, was mercifully dealt with, as it proved, for, overwhelmed at last in the same condemnation, he had yet been granted personal liberty, and his 'bosom's lord sat lightly on his throne' all through the trial, till the fatal verdict awoke him to the terrible reality. Potter, the first of three septuagenarians in the party, was so universally regarded as the *bête noire* of the bank, that even his many years and hoary head scarce brought him within the range of the pity extended to the rest. Salmond, grown feeble in the service, who had passed the legal prescription, having been in the service of the bank for forty years and upward, appears to have had everybody's good word. Taylor had been a magistrate and a ruler in the city of his crime, honoured in every way that a great civic community can honour its public men. Inglis, the third septuagenarian, had held his head high, practising in an honourable profession for half a century, and gracing his own enjoyment of life with the delights of literature and art. Innes Wright had been, like some of the others, a merchant prince; but at his name we feel disposed to hesitate, for undoubtedly one of the worst features of the case was the importation into the Board of one whose sole qualification was that he knew too much and owed too much to be trusted outside. Yet even he had been a man to whom the refinements of society were familiar, and his appearance up that trap-stair, leading to the dock in which murderers have sat, would not be without significance to him. Last of all, Stronach, 'the most credulous and facile man' Mr. Glen Walker ever knew, and justifying the character in his features, inherited by his own choice (though it is in evidence against his own desire) a weight of care and responsibility which his physically demoralized appearance at the bar showed to have been a burden too heavy for him to bear. 'Completely overpowered and unable to speak,' was Dr. M'Grigor's picture of the manager when he heard of the report about to be published. The contents of the report could not be new to him, and the consciousness that his long-concealed knowledge would now be shared by all the world does not seem to have had the ordinary effect of such a revelation, for his abject condition during the trial, culminating in the bitter tears which, happily it may be for him, broke out when the sentence was pronounced, showed that his physical deterioration during the long preservation of the secret had been so great that there was no rebound of relief when the load was removed.

"The point to which these remarks tend will, we think, have made itself plain. If men in offices of trust and responsibility are not held back from like crimes by the picture we have thus rapidly and broadly drawn, would a few months of incarceration, more or less, inflicted on those seven men act as a deterrent? We think not. Leaving the credit and honour of our country out of consideration for a moment, we should hope, merely for its pecuniary advantage, that there exists nowhere in the kingdom the necessity for another

such revelation as the bank fraud and the bank trial have brought to light. But should there be, unhappily, such another example of financial rottenness to be exposed, to those concerned in it we would point to the picture this trial has presented. *Faites le jeu, Messieurs*—Make your game, gentlemen, we say: only, 'be sure your sin will find you out,' if the dice are loaded, or there is any attempt to perform the card trick. The warning is not only to men who are tempted to 'slip' such a big card as one bearing £973,000 upon it, but it calls for the most scrupulous honesty and openness in dealing with even the minor chances and losses of the game of speculation. In another part of this journal we have said a few words on what it becomes the shareholder in a joint-stock enterprise to do. To the directors of such enterprises, this great bank trial, with its terrible social results, its sad personal accompaniments, and its end in the cells of a common prison, will have spoken in vain if it does not make it impossible for the inquiring shareholder to discover anything amiss, and equally impossible for the director to sleep soundly at night with the consciousness that he has concealed any loss, or connived at any mystery which it was his duty to have openly avowed."

Liability of Trustees.—In a letter to the *Times* on the recent decision of the Court of Session in Scotland on the liability of trustees, Mr. J. B. Hopkins says: "The Court of Session, being bound by the judgment of the House of Lords in *Lumsden* v. *Buchanan*, had no choice but to decide that a trustee incurs unlimited personal liability by holding a share avowedly as a trustee in an unlimited liability company; but it is permissible to consider whether a judgment which involves a most cruel injustice is on all fours with the principles of the law. Happily, an ultimate court of appeal has power to revise, amend, and reverse its interpretation and declaration of the law. In your lucid and exhaustive leading article a passage is quoted from the judgment of Lord Westbury, in which the learned judge holds that one reason for making the trustee personally liable is that otherwise there would be two classes of shareholders—partners with unlimited liability and partners with limited liability. But the judgment of their Lordships makes two distinct classes of partners. There are the unlimited liability partners who participate in the profits of the company, and there are the unlimited liability partners who do not, and cannot by law participate in the profits, for the trustee must account for the whole of the profits derived from the use and investment of the trust fund. The trustee only becomes a *de facto* partner in the event of the insolvency of the company. He is a partner who cannot gain a penny by the partnership, for if he does so, the law holds him guilty of a breach of trust; yet, according to the judgment in *Lumsden* v. *Buchanan*, the whole of his personal estate is liable for the debts of the company. But is the *dictum* correct that there would be two classes of partners in an unlimited liability company if trustees were not personally liable for the debts of the company? Let us not be misled by the word 'unlimited.' If A. on his own account becomes a registered shareholder in an unlimited liability company, the whole of his property is liable for the debts of the company—that is to say, the

whole of the fund (his property) out of which he invests in the unlimited company is liable. What, by parity of reasoning, ought to be the position of B., who, on account of a trust, becomes a registered shareholder in an unlimited liability company? Surely that the whole of the fund (the trust fund) out of which he invests in the unlimited liability company should be liable for the debts of the company? Surely it is not treating the liability of the several partners as equal when in the case of trustee shares, not only the whole of the investment fund is liable, but also the investing agent is made personally liable for the debts of the company. It would be obviously unjust to make the *cestui que* trust liable, because the trustee is not the agent of the person in whose favour he holds the estate, but the agent of the creator of the trust, the settlor. The agent is a trustee whose power and discretion are very straitly limited. He is strictly accountable to the law for doing precisely as he is directed by the settlor and by the law. If he makes an investment of the trust fund that is *ultra vires*—that is, an investment not specially authorized by the settlor or not allowed by the law—and the investment turns out badly, his liability is unlimited to make good the trust fund. But, according to *Lumsden* v. *Buchanan*, he is not only liable to make good the trust fund if it is lost by an investment that is *ultra vires*, but he is personally liable to the whole extent of his property, if he makes a trust investment in an unlimited liability company, whether the investment was or was not in accord with his duty as trustee. A share held by A. on his own account involves the liability of one fund—viz. the whole of A.'s estate. A share held by B. as trustee involves the liability of two funds—viz. the trust fund and the whole of B.'s estate. The agent who openly and avowedly holds the share as an agent, who cannot lawfully profit a sixpence by the investment, is personally liable, not only to the *cestui que* trust in case the investment was not duly authorized, but also for the debts of the company, as if he had held the share as a principal. The law will not allow him to make a penny profit out of the company because he holds the share as a trustee, as a mere agent; but if the company becomes insolvent, the law declares that the whole of his estate is liable for the debts of the company as if he had been, not an agent or trustee, but a principal shareholder. Heads the trustee cannot win, and tails he may lose the whole of his property. Such is the law according to the judgment of the House of Lords in *Lumsden* v. *Buchanan*. No wonder Lord Deas felt it a very painful duty to so declare the law. But does that judgment agree with the principles and doctrines of the law of the land? I am loath to believe that the principles of any civilized law, the so-called perfection of reason, support a judgment which inflicts most manifest and cruel injustice."

A Jury in Difficulties.—One of the cases which came before the

Canterbury County Court at the last sitting was one in which Messrs. Gavin & Son of Leith, rope and sail makers, sued Mr. Holt of Whitstable for the price of some rope, with which they had supplied him. Mr. W. N. Wightwick, who appeared for the plaintiffs, was so satisfied with the case, as laid before the judge and jury by the legal gentleman who opposed him on behalf of the defendant, that he declined to address the Court for his clients. His Honour also expressed a pretty decided opinion as to the merits of the defence, and he, too, refused to occupy the time of the jury with summing up the evidence. It seemed, therefore, a foregone conclusion that the jury would at once find for the plaintiffs, but to the surprise of every one in the Court they held a very grave consultation on the matter, and evidently could not agree. The judge, seeing this, endeavoured to explain the case in even plainer terms than it had already been put before them, and then one of the jury, after a further consultation, said, to the amusement of the spectators, that they found for the defendant. Before the sensation to which this announcement gave rise had passed away, one of the jurors bluntly asked which was the defendant, and which the plaintiff. The respective parties being pointed out to them, and the judge having once more tried to place the question in simpler phraseology than ever, the jury at length returned a verdict for the plaintiffs. It then turned out that the question which they had been debating was as to who was plaintiff and who defendant; and much laughter was caused by a second juror declaring that he did not understand which was which. It was evident, however, they intended a verdict for the Leith firm, and against Mr. Holt, and the learned judge remarked that if there had been a little want of understanding amongst them, they might console themselves by thinking they had given a very sound judgment.—*Solicitors' Journal.*

Literary Courtesy.—We observe that the article which appeared in our January number on "Forensic Medicine from a Scottish Point of View," by Professor Maclagan, has been made to do duty (divided into three separate papers) in the *Law Times* without any acknowledgment of the source whence it must have been taken. We have not the slightest objection to our contemporaries reproducing any of our articles in their columns, but it is at least usual to mention from what periodical such an extract is taken. In the present case the omission to do so may have been an accidental oversight, though this is not the first case in which the *Law Times* has failed to acknowledge the extent of the obligation under which it lies to other periodicals.

AFTER THE TRIAL.

I.

Now we know all the wretched history,
Though through these men such hopeless darkness came
To many households, we give not the blame
We thought to give to heartless villany
For corrupt personal ends forging a lie
To trap to ruin the unwary game;
No! it would seem as if their only aim
(Bewildered by the fearful legacy
Of debt they woke at last too late to know)
Was to tide on the Bank, in the wild dream
Some happy chance might yet avert the blow;
Unless they lied, at once collapsed the scheme.
Guilty they were, and this the law has said,
But guiltless of the crime 'twas ours to dread.

II.

And so to those who murmur at the meed
Of punishment awarded as too small,
Seeing the misery that like a pall
Rests upon Scotland partly through their deed,
This would I say, that Justice must take heed,
Ere on the guilty head her sword shall fall,
Of every motive of the criminal,
And in this case from personal ends she freed.
Strong upright minds and wills as firm as rock
Would have been theirs, if when they came to know
The ship was rotten, they had struck their flags;
But this stern duty's failure brought the dock,
And surely caused a wider spreading woe,
While deceit tore their honour into rags.

III.

No sadder sight I've seen for many a day
Than these white heads, some older than the span
The Psalmist limits as the age of man,
Ranged in the court the mark of obloquy,
To which their fellow-men were wont to pay
Honour and reverence. I could not scan
The features of the seven worn and wan
Without a sense of pity and dismay.
And now it is acknowledged not to these,
But unto others in whose place they came
(A direful heritage, devoid of ease),
Was chiefly due this blinding crash of shame,
On them and theirs surely Compassion's eye,
May bend and thoughts of vengeance wholly die.

IV.

My heart was troubled at the youngest there,
Upon whose face unutterably sad
Was written nothing either mean or bad,
But the black shadow of a great despair;
I thought perchance a dying brother's prayer
Impelled him to an enterprise so mad;
Who knows the wearing trouble that he had
To bear a burden that no man could bear?
And if his life became a living lie,
That rightly earned at last this doom of shame,
After three years of utter misery,
That now envelops those who own his name,
But all to save a dying brother, I
Will mingle other feelings with my blame. S.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF BANFFSHIRE.

Sheriff Scott Moncrieff.

GRAY v. REID AND MALCOLM.

Expenses—Debts Recovery Act—Remit to the Ordinary Roll—Procurator's Fee. —The circumstances in this case sufficiently appear from the following interlocutor and note:—

"*Banff, 19th February* 1879.—Having heard parties' procurators on the pursuer's motion, and considered the auditor's report on the pursuer's account of expenses as taxed: For the reasons stated in the subjoined note, finds that the pursuer is not entitled to the sum of one pound ten shillings sterling claimed by him as agent's fee, but finds him entitled to the sum of thirteen shillings in addition to the amount allowed by the auditor: *Quoad ultra* approves of the auditor's report, and decerns at the pursuer's instance against the defender for the sum of £42, 15s. 11d. sterling of said expenses, and for the expense of extracting. W. G. Scott Moncrieff.

"*Note.*—This case commenced its career in the Debts Recovery Court, but at an early stage, after pleas were noted, it was removed by the Sheriff-Substitute to the ordinary roll under section 8 of the Debts Recovery Act, 1867. The pursuer, who has been successful, now seeks to recover along with his other expenses the fee of 30s., being the amount of the procurator's fee under section 18 of this Act. That fee is allowed to be taken 'on decree or judgment in a contested case and procuring extract thereof.' It thus becomes due at the final stage of an action in the Debts Recovery Court. Now at this final stage in the present action the case was not in that Court. I am therefore of opinion that I cannot recognise this fee as one which can be claimed in virtue of the statute. Section 8 provides that after a case has been remitted to the ordinary roll it is to be proceeded with as is done where the remit is from the Small Debt Court, and under the Small Debt Act a remitted case is to be

'disposed of in all respects as if this Act had not been passed.' Under section 18 of the Debts Recovery Act it will be seen that this fee is intended to cover a great many things, including business, the charges for which form a number of the items sued for in this account of expenses. To award the fee would therefore have the effect of giving double payment.

"But at the same time it is only fair to allow the pursuer a reasonable fee based upon the principles of taxation in the ordinary Court, and this with the assistance of the auditor I have been able to fix.

"The defenders can hardly object, as, had the case been brought in that Court originally, the charge for the summons alone would have exceeded what is now given. W. G. S. M."

Act.—Coutts.——Alt.—Allan and Soutar.

SHERIFF COURT OF ABERDEEN.

Before Sheriff Comrie Thomson.

FORBES *v.* A. B.

Can a Lessee of Shootings prosecute for Poaching?—Sheriff Comrie Thomson, on February 5, in the Aberdeen Sheriff Court, gave decision on a point in regard to the competency of a tenant of shootings to prosecute persons found on their holdings in pursuit of game. On Friday, January 31, a complaint was brought against four young men from Stoneywood and neighbourhood, at the instance of Sir William Forbes, Bart. of Craigievar, tenant of shootings on the farm of Beadlieston, on the estate of Parkhill, charging them with poaching. Mr. Prosser, who acted as agent for the accused, took exception to the right of Sir William Forbes to prosecute. The case was adjourned to allow Mr. Butchart, agent for the complainer, to produce his authorities.

The Sheriff, after hearing the agents, said that the point raised was one of general importance. "It arose in this way: Sir William Forbes, who is complainer, prosecutes four men in respect that they were trespassing in pursuit of game upon an uncultivated piece of ground on the farm of Beadlieston. That piece of ground is in the tenancy of Mr. Alexander, a farmer, and is the property of Mr. Gordon of Parkhill. Sir William Forbes's title to sue, as set forth in the complaint, is that he is tenant of the shootings over the farm of Beadlieston, and the objection is taken that the right to prosecute under the Day Poaching Act rests either with the owner or the occupier of the land, or with the Procurator-Fiscal of the county, and with no one else. It is maintained for the complainer that, in respect that he is the tenant of the game– of the shootings—of the land, he must be held to be an occupier in the sense of the statute. There is no direct authority recorded in the books, so far as I am aware, and my friend, Mr. Butchart, has, I have no doubt, carefully investigated the reports, but he has not been able to furnish me with any authority more direct than the case of *Crawford* v. *Stewart*, in which it was held that the lessee of shootings in a parish where the assessment for the poor was imposed, one-half upon owners and the other half upon tenants or occupants of the lands or heritages, was liable to be assessed in respect of his lease as a tenant or occupant of the lands or heritages. Now, the principle underlying that case is this: that for the purpose of the Lands Valuation Act a right of shooting is to be regarded as an heritage—that is, a right which is inseparable from the ownership of land. It is to be borne in mind that in England, under an Act passed the year before the Scotch Act, which in almost every particular is identical in its clauses with the Scotch Act, it has been decided that a prosecution can be brought by a common informer, and that the title of owner or occupier is not necessary to enable one to prosecute under that statute. It was not always so, and in the case which settles it, the Court which decided it

expressed its great reluctance in coming to such a conclusion, but the law being as it is, a common informer or a gamekeeper, or in fact any one, may raise a prosecution under the English Day Trespass Act. But there are two—to my mind two conclusive—reasons to be found in the Scotch Act of Parliament against adopting the English statute in Scotland. In the first place, in the earlier part of the section under which this prosecution is brought, a clear distinction is drawn between the person who is the occupier of land and a person who is the occupier of land in the situation of this complainer. The first clause of the section provides that certain persons may require a person whom they find trespassing forthwith to quit the place in which he is, and to give his name and address, and if the person refuses to do that when required, he may be there and then apprehended. Now, that privilege is conferred upon this class of persons—first, any person having the right of killing game upon such lands; second, the occupier of the land; and third, any person authorized by either of them. It is, therefore, in the power of Sir William Forbes, or of any one occupying his position, with reference to this part of Parkhill estate, to apprehend any one whom he may find trespassing there if he fails to give him his name and address, and, in the same way, any gamekeeper or other person whom Sir William Forbes may authorize. But when you come to the latter part of the section, which deals with the prosecution of offenders, the words 'any person having the right to kill the game upon such lands' are omitted, and the prosecution is limited to the owner or occupier of such lands, and then, for some purpose which it is not necessary to define here, leave is given to the Procurator-Fiscal of the county to raise such prosecutions. I express no opinion as to whether the Procurator-Fiscal of the county is bound to undertake them, but he is at liberty to undertake them apparently if he likes. But the person having the right of killing the game has no right to prosecute in that capacity. Then it is remarkable and worthy of notice that these words, 'at the instance of the owner or occupier of such lands or of the Procurator-Fiscal of the county,' are not to be found in the English Act of Parliament. The words there are, 'Upon such persons being convicted before a Justice of Peace,' certain penalties shall follow, and the English Act does not specify who is to be the prosecutor, and upon that want of specification the English Court went in holding that anybody may prosecute. Here we are limited by the terms of the Act of Parliament, and therefore I am of opinion that this complaint must be dismissed."

Mr. Prosser claimed expenses on behalf of his clients, who were presumably innocent.

The Sheriff awarded each of the respondents £1 of expenses.

SHERIFF COURT OF DUNDEE.

Sheriff-Substitute Cheyne.

DON v. BREW.

Breach of Contract—Lease—Licence.—The following interlocutor and note explain the circumstances of the case :—

"*Dundee, 2nd January* 1879.—The Sheriff-Substitute having advised the process: Finds in fact (1) that the pursuer is heritable proprietor of the shop 39 Nethergate, Dundee; (2) that the defender leased said shop and pertinents from the pursuer for the period of five and a half years from Martinmas 1872 at the rent and subject to the conditions and obligations set forth in the lease No. 10 of process; (3) that one of the obligations undertaken by the defender in said lease was 'to keep the subjects,' in which a licensed grocery business had been carried on since the year 1844, 'licensed for the sale of groceries, wines, and spirits;' (4) that on entering into possession of the subjects the

defender obtained from the previous tenant a transfer of the then current licence, and at each of the Licensing Courts held in April 1873, April 1874, April 1875, and April 1876 he applied for and obtained a renewal of the licence; (5) that at the Licensing Court held in April 1877 the defender applied not only for a renewal of the licence for the pursuer's shop, but also for a licence for another shop situated a few doors further west the Nethergate which he had purchased, and to which he was then proposing to transfer his business, and, on being informed by the Magistrates that they would grant only one of his two applications, he withdrew that applicable to the pursuer's shop, and thereupon that applicable to his own newly-acquired premises was granted; and (6) that the pursuer's shop was thus unlicensed during the last year of the defender's lease of it, and for the greater part of that year the defender used it simply as a store in connection with his own shop: Finds in law, on these facts, that the defender is liable in damages to the pursuer for his breach of contract; assesses the pursuer's damages at the sum of seventy-five pounds sterling, and decerns against the defender for payment to the pursuer of that sum accordingly: Finds the pursuer entitled to expenses; allows him to give in an account, and remits the account when lodged to the Auditor of Court to tax and report. JOHN CHEYNE.

"*Note.*—The clause in the lease upon which this action is mainly rested is not very accurately worded, for, strictly read, it binds the defender to do something entirely out of his power; but it appears to me that the strict reading does not express the intention of the parties, and that what the defender really undertook, and what the pursuer understood that he undertook, to do was to take all the steps necessary to keep the shop licensed, and to do nothing prejudicial to its preserving that character. This seems to me a perfectly lawful and intelligible stipulation, and if so it is, I think, impossible upon the facts to doubt that it has been broken by the defender. If indeed the defender had left both his 1877 applications to be judicially dealt with by the Magistrates, and the latter had in their discretion refused to renew the licence for his old while they granted the licence to his new premises, I could have understood its being maintained that he had not violated the letter of his engagement; but by deliberately withdrawing his application for the old shop he has placed himself in a much worse position, the state of the fact thus being that the non-renewal of the old licence was the act not of the Magistrates, but purely and entirely of the defender himself. So far the case, I must say, appears to me to be a very clear one; but in determining the amount of the damage sustained by the pursuer through the defender's breach of contract I have experienced more difficulty, and the questions raised are certainly of some nicety, as well as novelty. The principle which governs the assessment of damages in such a case is, however, not doubtful, for what is allowed to be an authoritative exposition of it is given in the well-known case of *Hadley* v. *Baxendale*, 1854, 9 Exch. 354, 23 L. R. (Ex.) 179, where the Court said: 'We think the proper rule in such a case as the present is this, Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—*i.e.* according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.' Now, in coming to apply the rule or principle thus stated to the case before us, it seems to me to be a fair remark that in forming their contract the pursuer and defender had in view—(1) that on the expiry of the lease the premises were to be relet for the purposes to which they had been so long devoted, and (2) that the probable result of the defender's allowing the licence to lapse would be the frustration of that intention. In other words, they may, be held to have made their bargain under the influence of the idea—hether it be well founded or not as regards the centre of Dundee, is

certainly widely prevalent—that the possession of a licence enhances the value of a shop as a letting subject; and also in the belief—which every one who knows anything about the action of Licensing Courts will say was a reasonable one—that the renewal of an existing licence is more easily obtained than the granting of a new licence. Such being the views of the parties at the inception of the contract, that the pursuer should last spring accept, as he did, the offer of a Mr. Scroggie to take the shop, provided a licence was obtained for it, for five years from the expiry of the defender's lease, at an annual rent of £100, and the refusal of Mr. Scroggie's application by the Magistrates who sat in the Licensing Court in April last, may, I think, be fairly enough regarded as in the contemplation a probable result of the defender's failure to keep the shop licensed. It is no doubt true in one sense that that refusal was an act of the Magistrates alone, with which the defender had nothing to do; but it is also true that even as the law stood before 1877, and still more under what is known as Cameron's Act, which came into force at the beginning of that year, the pursuer and his prospective tenant were placed in a worse position for approaching the Court by the defender's action in abandoning the licence. It is therefore impossible to say that the refusal of the licence to Mr. Scroggie was not in some measure due to the defender's breach of contract; and, as it was in my opinion contemplated by the parties when they entered into their contract as a probable result of such breach, I feel justified, upon the principle laid down in *Hadley* v. *Baxendale*, in holding the defender liable in the difference (£75) between the rents which the pursuer would have received in the five years from Mr. Scroggie (the *bona fide* of whose offer I see no reason to doubt) and the sum which, according to the professional witnesses—who seem practically agreed that £85 would be a fair rent for the shop—he would have received in the same period if he had let it for another than a licensed grocery business. It was urged by the defender's agent as a reason why only nominal damages should be given, that had the defender kept the pursuer's shop licensed during the concluding year of his lease and applied for the first time in April last for a licence for his new shop, there was a considerable probability that his application would have been granted and Mr. Scroggie's refused, in which event the pursuer would of course be precisely where he is now; but in answer to this plea it is sufficient to say that there was at least an equal chance of the result being different, and that, dealing as I am with a wrong-doer, I do not feel bound or indeed entitled *in re incerta* to make any assumption in his favour. J. C."

Act.—Kyd.——Alt.—Cumming.

Notes of English, American, and Colonial Cases.

MARINE INSURANCE.—*Constructive total loss—Abandonment—Notice of, when necessary.*—Where the assured has received full information of a disaster having occurred to an insured vessel, of such a nature as to cause imminent danger of her becoming a total loss, he must at once make his election to treat the loss as constructively total, and must give notice of abandonment to the underwriters; and he is not excused from the necessity of giving such notice by the fact that the vessel has been subsequently sold, and that the sale as a matter of fact was the best course in the interests of all concerned, and that no advantage would, in the circumstances of the case, have accrued to the underwriters from such notice.—*Rankin* v. *Potter* (42 L. J. Rep. C.P. 169) explained. *Kaltenbach* v. *Mackenzie* (App.), 48 L. J. Rep. C.P. 9.

SHIPPING.—*Contract to supply cargo—Appropriation under the contract—Determination of election by void tender.*—Contract for the supply by plaintiffs to defendants of a cargo of maize, bill of lading to be dated between 15th May and 30th June, shipping documents attached as usual. Plaintiffs tendered the cargo of a ship of which the shipping documents had not arrived. Defendants refused to accept this cargo, and on an arbitration they were held to be justified in their refusal. Plaintiffs then tendered within the time named by the contract another cargo in every way satisfying the contract, but defendants refused to accept it. Plaintiffs sold this cargo at a loss and sued defendants for the amount of loss incurred by their non-acceptance :—*Held* (reversing the decision of Denman, J.), that plaintiffs were entitled to recover, that they had not elected to perform their contract by the tender of the first cargo, that being a bad tender, and were not thereby precluded from tendering the second cargo so as to bind defendants.—*Borrowman* v. *Free* (App.), 48 L. J. Rep. Q.B. 65.

MARRIAGE.—*By repute—Presumption—No evidence by any member of the family.*—A. and B. cohabited together as man and wife for thirty years, and until B.'s death in 1835. There was no evidence of any marriage having been solemnized, nor was there any affidavit in support of the marriage made by any member of the family; but there was general reputation that they were married, and proof of the registry of the baptism of several of their children as of A. and B. his wife. C., the brother of B., by his will made in 1871, gave a legacy to one of these children, describing her as "his niece :"—*Held*, that these children were entitled, as legitimate children of A. and B., to share, as next of kin, in a fund as to which C. had died intestate.—*Collins* v. *Bishop*, 48 L. J. Rep. Chanc. 31. *Semble*, a marriage may be established by repute, even though there be no positive evidence in support of the marriage, from any member of the family.—*Ibid.*

TRESPASS.—*Hunter in pursuit of fox.*—A person who is out hunting with foxhounds for the purpose of sport, cannot justify a trespass in entering the lands of another on the ground that he is in fresh pursuit of a fox.—*Paul* v. *Summerhayes*, 48 L. J. Rep. M.C. 33. Whether a person could justify a trespass on the ground that his only object and intent was to destroy a noxious animal, which could not otherwise be got rid of—*Quære.*—*Ibid.*

NUISANCE.—*Duty to neighbour—Tree poisonous to cattle—Liability to prevent encroachment of branches.*—An occupier of land adjoining a meadow where cattle are pastured, who grows a tree likely to be eaten by cattle, and poisonous, if eaten, must keep it within his own boundaries, and if he does not do so is *prima facie* answerable for the death of the cattle caused by their browsing on branches which project beyond his boundaries.—*Fletcher* v. *Rylands* applied. *Crowhurst* v. *The Burial Board of Amersham*, 48 L. J. Rep. Exch. 109.

SHIPPING.—*Ship's husband—Authority to bind shipowner.*—A ship's husband, as such, has no authority to bind the shipowner to pay money to the charterer in consideration of the cancellation of the charter-party.—*Thomas* v. *Lewis*, 48 L. J. Rep. Exch. 7.

CARRIERS BY RAILWAY.—*Undue preference—Unequal charges—Advantages of rival lines.*—The respondent carried on business as a brewer at B., and employed the appellants to convey goods for him by their railway. Respondent's premises were not connected by sidings with any railway. He was charged by the appellants a station-to-station rate for the carriage of goods to and from B. (inclusive of charge for station accommodation), and one shilling per ton for cartage. Three other firms at B. had premises connected with the Midland Railway by sidings, from which all goods forwarded or received were loaded and unloaded. The cost of cartage was thus saved, and in addition the Midland Railway Company allowed to these three firms a rebate of 9d. per ton, as representing the value of station accommodation, and other services which by reason of the [illegible]ecting sidings were not required. The appellants, with the view to the custom of the three firms, carted goods for them gratuitously, and

allowed to them also a rebate of 9d. per ton on the station-to-station rate. The result was that the respondent had to pay 1s. 9d. per ton more than the three firms for goods carried under the same circumstances:—*Held* (affirming the unanimous decision of the Queen's Bench Division and of the Court of Appeal, 47 Law J. Rep. Q.B. 284), that the transaction amounted to a breach of section 90 of the Railways Clauses Consolidation Act, 1845, as being a reduction of charges in favour of the three firms, and of section 2 of the Railway and Canal Traffic Act, 1854, as being an undue preference of the three firms, and that the respondent was entitled to recover back the 1s. 9d. per ton from the appellants.—*Evershed* v. *London and North-Western Rail. Co.* (H.L.), 48 L. J. Rep. Q.B. 22.

CHARITY.—*Scheme directing trustees to apply income in aid of particular school—Transfer of school to London School Board—Right to endowment.*—By a scheme approved in 1852 for appropriating the increased revenues of a charity estate founded for the benefit of the poor of the parish, the trustees were directed to pay £90 a year in aid of the expenses of a school in Flint Street, Walworth, or of any other school which might be established in its stead, provided that no sum should be paid to a school becoming the property of any exclusive denomination or sect, or excluding by its regulations the children of any class or denomination of persons. If the school should not at any time fall within the description of school, or should "become materially altered in discipline, numbers, or other circumstances," then the endowment was, in the discretion of the trustee, to be applied "for educational purposes amongst other schools of a similar character" in the parish. The managers transferred the school, and "so far as they lawfully could," the endowment to the School Board for London, the latter undertaking the management, and in consideration of the endowment agreeing to pay the then master of the school a pension of £100 a year:—*Held*, that the school had not by its transfer been "materially altered" within the meaning of the scheme, and that the School Board were entitled to the £90 a year.—*The School Board of London* v. *Faulconer*, 48 L. J. Rep. Chanc. 41.

CHARTER-PARTY—*Deadweight—Refusal of foreign Power to allow ship to load—Readiness to load.*—Plaintiff knowing that the ship R. was under a contract with the British Government to load military stores as deadweight at Malta, and that with such stores on board she would not, without special permission, be permitted by the Spanish Government to load any cargo at a Spanish port, entered into a charter-party with her owners by which it was agreed that the R., "after loading deadweight at Malta for owners' benefit," should proceed to a Spanish port, and there load a cargo of fruit. The ship proceeded with the military stores on board to Valencia to load plaintiff's cargo, but permission could not be obtained from the Spanish Government to load. The ship was in all other respects ready to load:—*Held*, that no action could be maintained by the charterers against the shipowners for not being ready to load, as both parties were prevented from performing their contract to be ready with a ship and cargo by the action of a superior Power.—*Cunningham* v. *Dunn* (App.), 48 L. J. Rep. C.P. 62.

FALSE IMPRISONMENT.—*Computation of time—One calendar month—Expiration of time of imprisonment.*—Plaintiff, who was sentenced by a magistrate to be imprisoned, first, for "one calendar month;" and secondly, "for fourteen days, to commence at the expiration of the imprisonment previously adjudged," was taken into the custody of defendant (the Governor of Coldbath Fields Prison) during the afternoon of the 31st of October 1877, and finally released at 9 A.M. on the 14th of December. Plaintiff complained that he had therefore been imprisoned for a longer period than he was liable to be detained, and he accordingly brought this action for false imprisonment:—*Held*, per Denman, J., that the plaintiff was not strictly entitled to his discharge until midnight on

the 14th of December, and that therefore he had not been detained illegally. —*Migotti* v. *Colville*, 48 L. J. Rep. M.C. 48.

FRIENDLY SOCIETIES ACT.—*Disputes between society and members—Jurisdiction of magistrate.*—The provisions of section 30 of the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), apply to friendly societies in general, and are not restricted, as with regard to industrial assurance companies they are, to such as receive contributions by means of collectors at a greater distance than ten miles from the registered office of the society.—*In re United Patriots' National Benefit Society and Holt*, 48 L. J. Rep. M.C. 55. Where, therefore, by the rules of a friendly society all disputes between members, or persons claiming through members, and the society, were to be referred to arbitration, it was held that, nevertheless, a Court of summary jurisdiction had jurisdiction, under sub-section 10 of section 30, to decide, upon the application of a person claiming through a member, a dispute between him and the society. —*Ibid.*

EXTRADITION ACT.—*Limitation of Act by treaty—Exemption of British subject from surrender.*—By the Extradition Act, 1870 (33 & 34 Vict. c. 52), section 2, her Majesty is empowered, in cases where an arrangement has been made with any foreign State for the surrender to such State of any fugitive criminals, to direct, by Order in Council, that the Act shall apply in the case of such foreign State, and may limit the operation of the order, and render the operation thereof subject to such conditions and exceptions as may be deemed expedient. By section 6, where the Act applies in the case of any foreign State, any fugitive criminal of that State who is in any part of her Majesty's dominions is liable to be apprehended and surrendered in manner provided by the Act. In 1874 a treaty was made in pursuance of the above statute, between the British Government and the Swiss Government, by which, however, it was expressly provided *inter alia*, that no subject of the United Kingdom shall be delivered up by the Government of the United Kingdom, and an Order in Council was subsequently issued which recited the treaty and declared that the Act should be in force as regards Switzerland. W., a British subject, was in custody on a charge of theft, alleged to have been committed in Switzerland, for the purpose of being handed over to the Swiss Government:—*Held*, that the prisoner was entitled to be discharged, inasmuch as the treaty contained an express exception in favour of British subjects, and the provisions contained in the Extradition Act could only apply so far as they were consistent with the terms of the treaty.—*R.* v. *Wilson*, 48 L. J. Rep. M.C. 37.

PRINCIPAL AND AGENT.—*Procurement of loan—Commission "on any money received"—Non-receipt through default of principal.*—Defendant entered into the following contract with plaintiff: "In the event of your procuring me the sum of £2000, or such other as I shall accept, I agree to pay you a commission of 2½ per cent. on any money received." The plaintiff procured a party willing to lend £1625 if the defendant showed a sufficient title to his security. Defendant accepted the offer, but failed to show a sufficient title. The negotiations consequently went off, and no money was in fact received by defendant: —*Held*, that plaintiff was notwithstanding entitled to his commission on the £1625, as it was owing to defendant's own default that he never received the sum, and the plaintiff had performed all his part of the contract. And, *semble* —per Bramwell, L.J., that those who bargain to receive commission for introductions have a right to their commission as soon as they have completed their portion of the bargain, irrespective of what may take place subsequently between the parties introduced.—*Fisher* v. *Drewett* (App.), 48 L. J. Rep. Exch. 32.

THE

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THE ROADS AND BRIDGES ACT, 1878.

In a previous number[1] we briefly glanced at the subject of road legislation in Scotland, and noted some of the more important provisions of the Act passed last session. It may not however be out of place to refer to the statute somewhat more in detail, especially as one or two counties have resolved upon its immediate adoption. It is unlikely that they will be able to adopt it without very considerable trouble. It is, perhaps, not in the nature of things that Acts of Parliament should ever be models of lucid or elegant English, but one might expect that they should express in reasonably clear phraseology the intentions of the Legislature. Such expectations have too frequently proved vain; indeed the meaning of some Acts of Parliament has only been ascertained after an amount of trouble and litigation which, to say the least, is not creditable to the British Parliament.

So far as we can judge, the Roads and Bridges Act is not distinguished for its clearness and simplicity, and it is proposed here shortly to indicate one or two of the practical difficulties and defects which are encountered in dealing with the statute.

Adoption of the Act.—The Act, as is well known, only comes into operation in June 1883, but may be voluntarily adopted in any county before that time. It seems to us unfortunate that a simultaneous adoption of it was not made imperative at some early date. No apparent benefit to the general public is to be gained by delay, while no small confusion must result from its partial adoption throughout the country. It has been said that the interval of five years before the Act becomes compulsory was provided in the interests of creditors. This may be so. If the roads in some counties were to be taken over by the new road authorities

[1] Vol. xxii. p. 505.

as they stand, it is evident that something considerably under their nominal value would be paid for them, whereas a year or two might be sufficient to put them in much better condition. If this was the motive for making the adoption of the Act before 1883 optional, it is doubtful whether it will really prove a benefit to creditors. If they are to put the roads in such a condition as to enable them to claim the full nominal value, they must in the meantime—until the Act is adopted—forego the interest they have hitherto been drawing.

The effect of the gradual adoption of the Act throughout Scotland can hardly fail, we think, to add very considerably to the trouble of administration; and in some cases it seems even doubtful *who* are to administer the roads. The existing road trusts have, in many cases, districts of road under their management which are partly situated in two or three different counties, the whole being under one management. It appears uncertain what would be the effect of the adoption of the Act in one of the counties through which the road passes upon the parts of the road situated in the counties which have not adopted it. Section 7 of the Act deals with this point, it is as follows: "Where it shall happen that this Act has been adopted or is in force in any county, but has not been adopted or is not in force in the county or counties adjoining thereto, any obligation, right, privilege, or duty in regard to *the management and maintenance of and the debt affecting turnpike roads* partly situated in two or more counties . . . . which, had this Act been adopted in the latter county or counties, would have fallen upon or belonged to the county road trustees, ... shall fall upon or belong to *the Commissioners of Supply thereof*," etc. Section 37, sub-section 2, letter *f*, apparently deals with the same case; it provides, "The portion of such road within any county in which this Act has not been adopted or is not in force *shall continue to be vested in and managed and maintained by the trustees having the management thereof at the commencement of this Act.*" These two sections appear to be inconsistent, but it is thought that, so far at all events as the *maintenance* of the roads is concerned, the duty of attending to this will remain with the old road trustees, as provided in section 4.

With regard to the mode of adopting the Act, it would appear that it is competent to follow one of three different courses. Sections 6, 8, and 9 of the Act deal with this important subject.

(1.) A meeting of Commissioners of Supply may be called in terms of section 6 to vote upon a resolution to adopt the Act.

(2.) A provisional agreement may be first entered into with burghs within the county, and a meeting of Commissioners then summoned to resolve whether the Act is to be adopted, subject to the stipulations contained in the provisional agreement; or

(3.) A meeting of Commissioners may be called to decide whether application shall be made to the Secretary of State for a provisional order, containing conditions as to the debt affecting and the cost and manner of managing and maintaining any highway in the neighbourhood of any burghs within the county. In this last case the Secretary of State, after inquiry, may issue a provisional order, which must be confirmed by Act of Parliament.

Of the three courses above referred to it would appear to be more prudent to follow the second—*i.e.* to proceed under the 8th section of the Act. If the preliminary negotiations with the burgh authorities should fail, then no meeting of Commissioners of Supply need be called to vote as to the adoption of the Act; and the negotiations with the burgh authorities may be renewed at any time; or should the Commissioners despair of coming to terms with the burgh authorities, a meeting of Commissioners may be called to resolve whether an application shall be made to the Secretary of State for a provisional order under section 9.

If the procedure followed be under section 6, and a meeting be called to resolve whether the Act shall be adopted, and it be found before the time of meeting that for certain reasons it is not desirable to adopt it *simpliciter*, and a majority of Commissioners vote against it accordingly, it seems that it would not be competent to call a meeting with a view to adopt the Act, under any of the three sections, for another year; see section 6, sub-section 2, which declares that "in the event of such resolution not being carried by a majority at such meeting as aforesaid, it shall not be lawful to call another meeting *with a view to the adoption of this Act* for one year thereafter." We understand that the question has been mooted whether, at a meeting called under the 6th section, it would be competent, after the resolution to adopt the Act had been put, to move as an amendment that an application be made to the Secretary of State for a provisional order under the 9th section. It appears to us that such a course would not be competent, the meeting having been convened for a different purpose.

As the attitude of burgh authorities with regard to the share of debt to be allocated to them, and the maintenance of roads in their neighbourhood, must have an important influence upon the decision of Commissioners of Supply in determining whether or not the Act ought to be adopted in any county, it would be well for Commissioners first to ascertain the terms upon which burgh authorities are ready to meet them, and then to proceed under whichever of the three different sections of the Act best suits the particular circumstances.

Valuation of Debts.—As regards the valuation of debt, a mistake appears to have been committed in not providing one uniform principle upon which the whole road debt of the country could have been valued. The procedure to be followed is contained in

sections 60 to 65 inclusive. We understand that some doubt has been felt as to what is meant by the expression, "within two months after the commencement of the Act," in section 60. Where a road trust has under its charge a district of road which lies in two or three different counties, and one of them only adopts the Act, is it the duty only of the clerk to the road trust *of the county adopting the Act* to make out a list of debts, etc.? or is it the duty also of the clerks *of all the counties through which part of the district road runs* to make out lists? We understand that the latter view has been acted on, but it appears to be a mistaken one, as section 1 declares that the Act "shall *commence* and take effect in each county from the date of its adoption therein."

One cannot help thinking that instead of leaving county and burgh authorities to settle as best they may with creditors and with each other in valuing and allocating debt, the appointment of a debts commissioner ought to have followed as a matter of course upon the adoption of the Act in any county. By that means a neutral and unprejudiced mind would have been brought to bear on the subject, and the public would have felt some assurance that his decisions were at least approximately fair and equitable. It is to be hoped, despite this defect in the Act, that in many cases negotiations as to the valuation of debt may result in an application for the appointment of a commissioner.

Section 65 provides that where a debts commissioner has been nominated, he shall, in making such valuation, "take into account the interest paid on such debt out of the trust funds, the state of repair of the roads or bridges to which the debt is applicable, and shall take into consideration every circumstance which might in his opinion reduce, enhance, or in any way affect the value thereof," etc. The range of considerations which may affect the decision of the commissioner is thus very wide. Among these we would venture to suggest that in the case of proprietors being creditors, the benefit to their estates resulting from the making of roads should not be lost sight of. A Royal Commission reported in 1859 that a great proportion of road debt must be looked upon as of very little value, and much of it as entirely irrecoverable. In Aberdeenshire, when tolls were abolished, it was held, in the case of creditors who were proprietors of adjoining estates, that they had been repaid to a large extent by the opening up of their estates in consequence of the making of the roads, and the whole road debt of the county was valued at something like one-fifth of its nominal value. The condition of the roads themselves is obviously a consideration which ought to operate materially in valuation of debt. In many counties the provisions of the General Turnpike Act have been grossly neglected. The revenue derived from tolls, etc., has been frequently applied, *first* to payment of interest on debt, and only *secondarily* to the maintenance of the roads. This and other contraventions of the Turnpike Act is perhaps the most unnatural result of having made

creditors eligible as road trustees under it. It is to be hoped that ere long some county may take the initiative and apply for the appointment of a debts commissioner. The results of such an appointment would be watched with much interest throughout Scotland generally, and until a precedent of the kind is furnished, county and burgh authorities must feel naturally disinclined to commit themselves as to the valuation and allocation of debts.

Allocation of Debt.—The subject of allocation of debt is dealt with in sections 66 and 67, and seems likely to prove difficult to deal with. Section 66 provides that the trustees of counties through which any road (situated in one or more counties) runs, may adjust, compromise, and determine in what proportion the debt is to be allocated. Who are the trustees? Evidently, in the case of a county having adopted the Act, the new road trustees. But in counties *not* having adopted it, the duties in regard to maintenance and management of turnpike roads partly situated in two or more counties, seem to devolve, according to section 7, on the Commissioners of Supply, and according to section 37, sub-section 2, letter *f*, upon the old road trustees! On the failure of the trustees, whoever they may be, to allocate debt within one month after the date of its valuation, a debts commissioner may be applied for, and he is forthwith "to proceed to ascertain and determine the proportions in which, according to equity, and taking into consideration all the circumstances of the case, the debts aforesaid ought to be, and shall be allocated upon, and be a charge against, the several counties respectively." What the "circumstances" are which are to weigh with the commissioner it is difficult to imagine. As regards the allocation of debt between counties, it appears to us that it ought to be allocated simply according to the *mileage*, unless exceptional expense was incurred in the formation of part of the road. It has been suggested that in the allocation of debt regard should be had, not only to the mileage, but also to the average cost of maintenance. On this principle, if the maintenance of ten miles of a particular road (of thirty miles long) cost on the average twice as much as the maintenance of the remaining twenty miles of it, the debt to be allocated on the ten miles would be the same in amount as on the twenty miles. We are unable to see any warrant for the application of such a principle of allocation. The allocation of debt between county and burgh is a more difficult matter, and it is surprising that the bill does not fix some principle on which the debt might be allocated equitably as between them. While it seems fair enough, in the case of counties, that mileage should determine the extent of liability, it is obvious that this method of allocation as between county and burgh would operate unduly in favour of the latter. A burgh or burghs may include a very large proportion of the wealth and assessable rental of a county, and at the same time may include a very small mileage of road, and it is evident, we

think, that it would be absurd and inequitable to apply the same principle of allocation between county and burgh as between county and county. The decision of a debts commissioner on this question will be looked for with much interest.

With regard to burghs another omission in the bill appears to be, that there is no burden laid expressly on them to maintain the roads within a certain distance *outside* their boundaries. Such a provision would have been most equitable. The traffic of a burgh cannot be strictly confined within the municipal boundaries, it must necessarily overflow to a greater or less extent, and counties ought to have been relieved of the burden of maintaining roads which are chiefly cut up by burgh traffic. Section 9 of the Act seems, however, to contemplate that in the event of a county adopting the Act, by applying to the Secretary of State for a provisional order under that section, such provisional order may contain an obligation on burghs to maintain roads *outside* the municipal boundaries. The Act, it provides, is to come into force subject to conditions contained in such order in regard *inter alia* "to the cost and manner of managing and maintaining any highway or highways in the *neighbourhood* of any burgh or burghs," etc. On the other hand, burghs may refer to section 46 of the Act, which declares that the boundaries of burghs for the purposes of the Act are to be the municipal boundaries.

Section 16 directs that counties be divided into districts, and district committees appointed; but it provides that where the county contains fewer than *six parishes*, such a division shall not be requisite. Does the expression "fewer than six parishes" mean five or fewer parishes; or would the case of a county containing five parishes and parts of another parish be relieved of the obligation to divide into districts?

Section 57 appears to be a most useful one, although its meaning might have been made clearer. It gives power to the road authority of a county or district to recover expenses of *extraordinary traffic* before the Sheriff. It does not, however, clearly indicate what is to be regarded as extraordinary traffic. The difficulty seems to be to decide whether the traffic must be unusual and excessive, having regard to the ordinary traffic on the road itself, or having regard to the average expense of repairing highways in the neighbourhood; in short, whether the traffic must be extraordinary and exceptional to the particular road, or only extraordinary compared with other neighbouring roads. We are aware that different views have been taken of this section, and a judicial interpretation will probably be required to settle the point. We hope to return to this subject in another number.

IMPLIED ENTRY.

We have before (vol. xxii. p. 119) called attention to the decisions of the First and Second Divisions of the Court in the cases of *Rossmore's Trustees* v. *Brownlie*, November 23, 1877, 5 Rettie, 281, and *Ferrier's Trustees* v. *Bayley*, May 26, 1877, 4 Rettie, 738. These decisions affirmed the proposition that since the passing of the Conveyancing Act, 1874, it is not relevant for a purchaser infeft (whether before or after the passing of the Act), and not possessing on a personal title, to tender the heir of the last entered vassal for an entry on payment of relief duty in answer to the superior's demand for a composition, or rather (for an entry is not required) to state that the heir of the investiture is willing to enter. In the first of these cases the Court had not the benefit of any judgment from Lord Young, who was the Ordinary in the case, because the question of implied entry was pleaded for the first time in the Inner House. But Lord Deas recorded his powerful dissent against the judgment. In the second case the judgment of Lord Curriehill was affirmed, but Lord Gifford gave an elaborate opinion dissenting from the judgment. We formerly stated that in our view both these judgments were indefensible, because, although based on a statute professing in this matter only to simplify Conveyancing, and also to reserve the pecuniary rights of superior and vassal, they in reality enlarged the pecuniary rights of superior, and destroyed an ancient valuable right of the vassal which had been constantly and familiarly recognised in Conveyancing practice. The same process of judgment and dissent has just (February 26, 1879) taken place in the case of *Rankin's Trustees* v. *Lamont*, in which the Second Division have followed the two previous decisions, by which, indeed, on one view of the legal question, they were probably bound. The judgment, however, cannot be described as a very satisfactory one to the defenders, even although they are only trustees for others. It consists of the opinion of Lord Ormidale, to which he was committed by his former judgment; the opinion of Lord Gifford, which remains the same as in *Ferrier* v. *Bayley*, but is surrendered out of respect to the authorities; and the opinion of Lord Young, who enters a new and, as we venture to think, conclusive protest against both the principles and the results of the previous decisions.

In *Rankin's Trustees* v. *Lamont* the last entered vassal died in 1873, leaving a general trust disposition and settlement on which the defenders, his trustees, were infeft on 27th March 1874, prior to the passing of the Conveyancing Act of that year. That Act having passed, and the entry of singular successors being untaxed by the original charter of the subject, Lamont, the superior, raised an action for one year's rent, as composition due on the entry of the trustees implied in terms of the statute from their infeftment.

To this the trustees replied by the averment that one of their number, being the heir of the last entered vassal, the truster, was willing to enter by precept of *clare constat* and pay relief duty, and they accordingly offered to get such a title completed. They further pleaded that they were not bound to pay more than relief duty, because they held the trust estate truly for the benefit of the truster's heir. Both these pleas were repelled by Lord Curriehill: the first on the authorities to which we have just referred; the second on a principle which his Lordship deduced from *Magistrates of Musselburgh* v. *Brown*, M. 15038, and *Grindlay* v. *Hill*, 19th January 1810, F.C., that "the Court will not compel a superior to grant an entry to any one for payment of an heir's relief duty, where by doing so he may debar himself from demanding a new entry, or payment of a new casualty, immediately on the death of the heir." Rankin's trust was a trust to pay debts and legacies and to entail, and included power of sale, and Lord Curriehill therefore thought it was not true in point of fact that the trustees held merely for the heir. This judgment has now been affirmed by the divided opinions of the Second Division, to which we have already referred. But the interest of the case, which will no doubt go to the House of Lords, centres in the dissent of Lord Young.

After pointing out that prior to recent legislation the trustees could have made up a title only through the obligation imposed on the heir to dispone and by his entry, a tedious process now avoided by notarial instrument, specialising the general disposition, Lord Young records the important admission of the superior's counsel, that there was not the slightest trace in practice of a composition of a year's rent having been required from testamentary trustees in the position of the defenders. This practice may have been explained by the possibility of tendering the heir for entry, and accordingly the superior's argument was that, as entry had already taken place by implication, there was no room for the heir. The object of the statute, however, was simplification of title; and as a universal compulsory implied entry, followed by all the ordinary consequences of entry, would have entirely altered the relative values of many estates of superiority and property, provision is properly made by the statute that, where the entry is not at the request of the vassal, but implied, the superior's right to casualty is to be neither diminished nor accelerated. Whether the mid-superiority was defeasible or not at the will of the disponee was entirely a matter of agreement between the vassal and sub-vassal in which the superior had no concern. In the case of a pure *de me* holding no question could arise; and under a double holding the only reason why disponees bargained with the superior for an entry was that they got better terms while it remained uncertain when the heirs of the investiture might become extinct or would refuse to consent to enter. This is the explanation of the fact that the value of superiorities and properties is varied so much by the

prohibition of sub-infeudation, the source of the variation being the amount of casualties. The Act of 1874, however, supplies a criterion of the superior's demand to a casualty, viz. whether before the Act he could have required the vassal to enter or to pay. The implied entry is necessarily to be disregarded in applying this criterion. The superior's argument, founded on implied entry, would go the length of establishing the claim to a casualty even during the life of an heir entered under the last investiture. His Lordship assumed, in deference to the case of *Dundas* v. *Drummond*, M. 15035, that in general the heir of a mid-superior could not be compelled by the sub-vassal to enter (though this had been doubted by Lord Moncreiff in *Fullerton* v. *Hamilton*, 12 Sh. 117); it was clear that in the circumstances of *Rankin's Trustees* v. *Lamont* the heir would have been bound to enter and convey in implement of the obligation imposed on him by his ancestor.

Lord Young then proceeds to comment on the prior decisions. In *Ferrier's Trustees* v. *Bayley*, he points out, the defender, on whose implied entry in a sub-feu the casualty was demanded, was himself the heir of the last entered vassal in the mid-superiority, and was therefore entitled to succeed his predecessor in that investiture without reference to the sub-feu which he acquired (so to speak, accidentally) by a singular title of gift. The implied entry, operated by statute, merely relieved the heir from the necessity of using a precept of *clare constat*, but could not confer on the superior the right to demand a year's rent to which he would not have been entitled by law or paction prior to the Act. In the case of *Grindlay* v. *Hill* the superior did not require testamentary trustees to enter. He offered, in accordance with practice, to enter the heir, but the trustees refused this and demanded an entry, for what reason did not appear. The decision was, therefore, quite consistent with the contention of the defenders in *Rankin's Trustees* v. *Lamont*, but inconsistent with the contention of the pursuer, who said that the "implied entry" put all testamentary trustees, it might be very much against their wills, in the position of demanding an entry from the superior, and therefore liable in composition as the condition of entry. This was entirely against the declaration of the statute that the right to casualty was to be considered irrespective of the entry. *Ferrier's* case, indeed, may be said to have been decided independently of the statute altogether. According to its authority "the superior was entitled to a year's rent on the entry of the heir of investiture who had acquired right to a sub-feu created by his predecessor." The case of *Rossmore's Trustees*, on the other hand, was distinctly a decision on the effect of the Act upon the position of a purchaser. The same result, if well founded, would follow in the case of testamentary trustees, but to them much of the language used by the majority of the Court about "technical devices" and "Conveyancing manœuvres" would scarcely be applicable.

It had been said by the Lord Ordinary in *Rankin's Trustees* v. *Lamont* that were an entry given to the trustees on payment of relief, or rather were the superior's demand on their implied entry limited to relief, his claim for composition would be excluded till the death of the longest liver of the trustees. This result, Lord Young was of opinion, would not follow, unless indeed the trustees were now to pay composition. Had the Act made *implied* equivalent to *demanded* entries, then the liability of the defenders would probably be determined by *Grindlay* v. *Hill*. But in such a question the Act directed parties to ignore the implied entry, its object being "to harmonize the simplification of title with the preservation of substantial rights."

We have thought it necessary to give this elaborate summary of the judgment, because, as Lord Young said, it is difficult to exaggerate its importance, and the profession ought at once to be informed of the fresh doubt which has been cast upon the two cases, which must of course be in the meantime accepted as settling the law. The full year's rent was under the old law very seldom recovered, except in cases of building feus with prohibitions against sub-infeudation. But it will now very frequently be recovered even in the case of infeftment under the simplest of family settlements. Conveyancers will therefore do well to consider the practical suggestion with which Lord Young concludes his judgment, viz. that wherever sub-infeudation is not prohibited they should take care in preparing testamentary trusts to limit the holding to *de me*, so as to permit of the trust title being recorded under the protection of an indefeasible mid-superiority. Thus, the old convenience of infeftment on a double holding (which had become a matter of statutory implication under sec. 6 of the Titles Act, 1868) is entirely destroyed; and the construction put on the statute of 1874 by majorities of the Court in three cases will apparently lead to the perpetuation of mid-superiorities, which, according to the opinion of these majorities, it was one leading object of that statute to abolish. The matter is made more serious by the retrospective operation of the Act. One further doubt is suggested by Lord Young, viz. whether logically, on the principles of interpretation laid down in *Rossmore's Trustees*, the superior might not claim composition on an implied entry even during the life of the author, entered in the fee.

RECENT DECISIONS RELATING TO INSOLVENCY.

UNFORTUNATELY there are no legal questions at the present moment more prominent than those which arise out of bankruptcies. We propose now to note in some convenient order a

few of the points recently settled in our Courts of law relating to sequestrations or trust deeds, and their effect upon bankrupts and creditors.

Before dealing with the statutory mode of securing and distributing the estate of an insolvent, let us call attention to one or two decisions bearing upon those private arrangements made for the benefit of creditors.

Trust deeds.—In the case of ***Marianski* v. *Wiseman*** (March 10, 1871, 9 Macph. 673) we find a creditor, who had not in any formal way acceded to a trust deed, barred from using diligence in the hands of the trustee to the prejudice of other creditors. He had approved of the trust deed verbally to the trustee after receiving intimation of the conveyance which had been granted from the truster, and he had then attended a sale of the debtor's property at the instance of the trustee and thus made purchases. As indicated by the judgment of the Lord Ordinary, it might still be open to such a creditor to object to conditions in the trust deed itself, or to the judgment of the trustee and discharge of the debtor.

Where a party who has granted a trust deed, and come under obligations in this way to a trustee or cautioner for the amount of his composition, has continued to carry on business and incur liabilities, attempts have been made to involve in such liabilities the trustee or cautioner. In the case of ***Eaglesham* v. *Grant*** (July 15, 1875, 2 R. 960) an insolvent (Munro) agreed with his cautioner (Grant) that the latter should, after paying out of the proceeds of the business the instalments, receive a certain percentage on the gross profits of the sales; any balance which might remain over was then to be accounted for to the insolvent. The business resulted in a loss; and creditors who had supplied goods sued the cautioner on the ground that, in respect of this agreement and his actings, he must be viewed as a principal for whom the bankrupt had acted, or at least as a partner with him. The Court, however, viewed the agreement as a mere security to the cautioner for the sums in which he was liable to the creditors under the trust deed. "It is clear," said the Lord Justice-Clerk, "that the whole transaction, by whatever name it is called, was nothing but a security. It was a piece of mechanism devised for the purpose of getting Munro's composition accepted, for the purpose of securing the creditors in payment of that composition, and also for the purpose of securing Grant, who guaranteed the payment of two of the composition instalments, against loss in consequence of his guarantee." And Lord Neaves remarked: "If by any means, either from the business or from extraneous sources, Munro had been able to pay off his debts and Grant's commission, Grant's right and interest would have ceased at once. No equity demands that Grant should be made liable to parties who never knew anything of him until after Munro's sequestration." The Court have exhibited equal unwillingness, under somewhat similar circumstances, to

involve a trustee in liability to creditors. In the case of *Miller* v. *Downie* (March 4, 1876, 3 R. 548) we find a trustee who, in terms of an agreement with the insolvent, had, upon failure by the latter to pay an instalment of the composition due, taken possession of his shop and sold off his effects, sued by a creditor who had supplied goods, a portion of which had been sold in this way. The Sheriff-Substitute and Sheriff of Lanarkshire found the defender liable *qua* trustee. Not satisfied with this decision, the pursuer appealed to the Court of Session, who freed the defender from all liability. In giving judgment the Lord Justice-Clerk said: "I am very clear in the general case that a trust deed for security and payment of debt does not of itself divest the granter or render the trustee or acceding creditors liable for the subsequent contracts made by the granter, unless they have by the nature of their proceedings acted as principals in the contracts themselves, or in the subjects to which these contracts relate. Their primary position is that of creditors only, and as long as they act in consistency with that character they will not be liable in any other."

Where a trustee for behoof of creditors receives remuneration for his trouble, the Trusts Act of 1867 does not apply, and accordingly if such a trustee were to die or become incapable of acting, his successor could not be appointed under the application which section 12 of that statute permits. This was decided in the case of *Mackenzie and others* (May 28, 1872, 10 Macph. 749), where the question raised was admitted by the Lord President to be attended with considerable difficulty. For while the earlier Trust Acts of 1861 and 1863 are clearly limited in their operations to the case of gratuitous trustees, that of 1867, which declares that it is expedient that greater facilities should be given for the administration of trust estates in Scotland, defines the words "trust" and "trust deeds" in these Acts to mean and include all trusts constituted by any deed or by Acts of Parliament. It goes on, however, to define the words "gratuitous trustees" as meaning all who are not entitled to remuneration as such for their services; and the Lord President remarks that if the statute "is to be read as comprehending every species of trust, I cannot understand why it should include a definition of that term, unless to regulate its use as regards the Act itself, and the object must be, therefore, to determine the kind of trusts that are to be affected by the operations of the Act." Hence he was of opinion that it applied, like the two former statutes, only to gratuitous trusts.

Infeftment upon a trust disposition for behoof of creditors does not divest the granter of the radical right; the heir, therefore, can overlook the trustee in the process of completing his title. This point seems to have been settled by the case of *Campbell* (Jan. 14, 1801, M. Adjud. App. 11), referred to as an authority by Lord Moncreiff in the case of *Macmillan* v. *Campbell* (March 4, 1831,

9 Shaw, 551). In Campbell's case his estate had been conveyed to trustees heritably and irredeemably for payment of his debts. The trustees were infeft. Campbell died, and the creditors took diverse courses; some charged the heir to enter and adjudged the estate *in hæreditate jacente*, while others adjudged from the trustees. Hence a competition arose. The Court decided against the latter. The point was again raised in Macmillan's case, in which it was held that the trustee, in spite of a conveyance to a trustee, had still the radical right to the lands left with him, and could execute a valid deed of entail. It was then unsuccessfully maintained that Campbell's case only established that, "as the *jus crediti* remained in the granter, and so lay in his *hæreditas jacens*, and never was nor could be in the trustees, no adjudication could take it out of them," and that upon this ground the adjudgers from the heir had been preferred. We have referred to these cases because the question has quite recently been revived in the case of *Gilmour* v. *Gilmours* (July 3, 1873, 11 Macph. 853), where it was attempted to make up a title by means of a conveyance from a trustee who had been infeft on a trust disposition bearing to be for behoof of creditors. It was argued that the granter or his heir may, if he thinks fit, avail himself of the trust infeftment and accept a conveyance from the trustee as a feudal title to the lands. "I do not doubt," said the Lord Justice-Clerk, "that a title may so stand that the proprietor, having the radical right, may use a trust title as the foundation of his feudal progress, although, if he had chosen to disregard it, no one had right or interest to plead on the trust title;" and he quotes the case of *Rose* v. *Fraser* (Ross's Leading Cases, i. 452), but remarks that a distinction lies at the foundation of this decision, viz. that between a right *ex facie* absolute, although in reality only a trust, and a right which is *ex facie* only a burden or security.

Sequestration.—The second section of the statute 23 and 24 Vict. c. 33, allows a petition to be presented for recall of sequestration within three months after the date of granting it, where a majority of the creditors in number and value reside in England or Ireland. The disposal of the petition is left to the discretion of the Court, even when there is no doubt of the fact upon which it is based. In the case of *Smith, Payne, & Smiths* v. *Rischmann* (Nov. 6, 1869, 8 Macph. 100) the bankrupt had admittedly no creditors in Scotland. He had come to this country for the purpose of benefitting by our bankruptcy law. He had creditors in England, apparently a majority in number, but the majority in value were abroad. The English creditors applied for a recall under this section. As compared with Scotland, there was no doubt that the majority of creditors, both in number and value, were in England; but the Court, with the exception of Lord Deas, could not get over the fact of the foreign creditors, which rendered the English majority only relative, and which, in their opinion, prevented the

application of this statute. Had it been a question of discretion, it is clear that they would have recalled the sequestration. Lord Ardmillan admitted that it might be a more salutary and expedient arrangement to have a distribution of the estate in England, and Lord Kinloch said the reasons for such an arrangement were strong. Lord Deas, evidently more impressed with the spirit of the statute than with the letter, held that it had no reference to creditors abroad, and that therefore the application was competent. The Lord President traces the origin of this provision in the Act 23 and 24 Vict. c. 33 to the case of *Joel* v. *Gill* (June 10, 1859, 21 D. 929, and Nov. 23, 1859, 22 D. 6), "in which a person who had contracted debt in England, who was an Englishman, and whose assets were in England, came for forty days to Tobermory, and having thus subjected himself to the Supreme Courts of Scotland, applied for and obtained sequestration. An attempt made to recall the sequestration was unsuccessful, because of the broad words of the 13th section of the Act of 1856. But all the judges felt that it was a crying evil, and that some alteration should be made in the law in order to prevent persons in the situation of the bankrupt from coming to Scotland for the purpose of having their estates wound up there. In consequence of that feeling a remedy was introduced by the statute 23 and 24 Vict. c. 33. It must be observed that the remedy provided by this statute only goes a certain way. It might have gone much further, but stops short at a certain point; and we must take care that, in our desire to prevent any bankruptcy proceeding in this Court while it might be more conveniently carried on elsewhere, we do not go beyond the statute." In this same case the Court refused to recall upon the ground of non-description. The bankrupt had two Christian names, and had traded under one of them only. In his application for sequestration his full designation was given, but it was clear that the petitioner for recall had not been misled, and his plea was disregarded.

In the case of *Foulds* v. *Leisk* (Nov. 22, 1873, 1 R. 201) an incarcerated bankrupt who had been sequestrated obtained liberation upon security to attend all diets for the period of six months. The incarcerating creditor appealed, and also applied for recall of the sequestration. In giving judgment the Lord President said, "The creditor here is entitled to have the bond of caution altered, and that the conditions should be, not to attend all diets of the sequestration for six months after his liberation when required by the trustee, but that, in the event of the sequestration being recalled, he should surrender himself to the diligence of the incarcerating creditor."

The fact of obtaining sequestration does not confer upon the debtor a right to demand immediate liberation. In the case of *Armstrong* v. *M'Gill* (Feb. 18, 1869, 7 Macph. 347), the Court, in declining to interfere with an interlocutor of the Sheriff refusing

liberation "in the meantime," observed that if there was any idea prevalent that a debtor could as a matter of course obtain liberation from prison on his estate being sequestrated, it was important that such a mistake should be corrected.

We note one or two important points relating to the question of *caution* for the expenses of litigation in which an insolvent may engage. In the first place, caution is not necessary where the bankrupt seeks merely a suspension of diligence against himself, although the suspension may raise important and difficult questions between him and his creditors. "That cannot interfere with the right of the bankrupt to defend himself against incarceration on all competent grounds without being called on to find caution for expenses," *per* Lord President in *Young* v. *Robertson* (March 13, 1875, 2 R. 599). Caution is unnecessary when the question of whether or not a party is solvent depends on the result of the action in connection with which caution is demanded. In *Weir* v. *Buchanan* (Oct. 18, 1876, 4 R. 8) the judgment of a Lord Ordinary compelled a defender to call his creditors together, while he at the same time reclaimed against it. The successful party asked that caution should then be found, but the Court declined to order it. As the Lord President said: "I understand that if the defender were to be successful in this reclaiming note, and to obtain judgment in terms of his pleas, he would not be insolvent. This has not been contradicted. His position, therefore, is that he is provisionally insolvent, and I am not aware that on that ground we have ever ordained a defender to find caution."

In the following circumstances the Court also refused a motion for caution. We quote from the remarks of the Lord President in *Burnet* v. *Murray* (July 10, 1877, 14 S. L. R. 616): "The bankrupt was sequestrated in 1867, and has since that time been carrying on business for several years, and in particular has entered into a joint adventure with the other party to this action, from which joint adventure the cross actions now under appeal arise. Then when a partnership accounting is brought, is it to be allowed that his partner should turn round and say, 'You were sequestrated in 1867 and have not been discharged, and you must find caution for expenses here'? The proper motion for the respondent's counsel to have made would have been for intimation to the trustee. Instead of that he comes suddenly with this motion, which is as irregular in form as it is unfounded in substance." When it was admitted at the bar that the defender had sought and obtained an interview with the cautioner, which, as appeared by a letter from him to his principal, the pursuer, had the effect of inducing him to withdraw from his position as cautioner, the action was allowed to proceed without fresh caution being found (*Oliver* v. *Robertson*, Oct. 30, 1869, 8 Macph. 82). Lord Neaves said: "I am glad that we are all agreed upon this, that any communication by one litigant to the cautioner of his opponent, with the view or result of getting him

to withdraw from his obligation, is an illegitimate proceeding, if accompanied by anything like misrepresentation or working on his fears. A litigant is entitled to go to the cautioner before the bond is lodged, with a view to satisfy himself of his solvency; but when the bond is lodged, and he must be presumed to be satisfied of the cautioner's solvency, he ought to keep entirely aloof, and to do nothing that can have the effect of inducing him to withdraw." Although a bankrupt cannot sue without caution being found, in the case of *Horn* v. *Sanderson & Muirhead* (Jan. 9, 1872, 10 Macph. 295) it was held that a bankrupt's wife might sue an action of damages for personal injury to herself, with his concurrence as her administrator-in-law. In this case both husband and wife sued, he for the damages which her injury had indirectly caused to him. As his trustee did not sist himself, and caution was not found, it was held that the action at the husband's instance could not be gone on with, but the trustee and commissioners had assigned to the wife (exclusive of her husband's *jus mariti*) their claims against the defenders. As therefore there could be no question between the wife and the trustee, she was allowed to proceed with her action, and it was held that the fact of bankruptcy did not deprive the husband of his right to act as her administrator-in-law, nor was it necessary that he should find caution before acting in this capacity.

AGRICULTURAL HYPOTHEC.

Politics have no place in the *Journal of Jurisprudence.* We are therefore unable to discuss the subject of the Land Laws with perfect freedom; nay, we scarcely venture to *discuss* them at all. But it is necessary for lawyers to watch with great attention the tendencies of legislation. This duty has not infrequently been neglected. The result of this has been that immature plans and hastily-framed measures have been passed from time to time, the language of which has been so ambiguous that the country has had to apply to the courts of law to put an interpretation upon clauses which, with the assistance of professional men, might easily have been worded so as to be perfectly plain and intelligible. In every department of law the Legislature and the country would be benefited if lawyers watched the drift of projected law reforms; but when so vast a subject as the land laws is being revised, it is absolutely necessary that minds legally trained should see what it is proposed to do.

A short but able pamphlet has just been published by the Directors of the Scottish Chamber of Agriculture, entitled "The Land Laws, as they affect Landowners, Farmers, Workers, and Consumers." In Scotland the influence of the Chamber of Agri-

culture is considerable. It is composed mainly of men practically acquainted with the working of the land laws, and who are, therefore, entitled to speak upon the subject. They now call attention to the law of hypothec, and demand its abolition. For many years hypothec has been a weariness of the flesh to English members of Parliament, and a bone of contention to Scottish representatives. But at length the almost unanimous opinion has been arrived at, that it is a question on which the people of Scotland are practically at one. The verdict is against the law of hypothec, and a bill for its abolition has been read a second time. Mr. Vans Agnew, in a bill of two clauses, proposes a sweeping reform. His first clause destroys the agricultural landlord's hypothec; his second proposes a modification of the Act of Sederunt of 1756 anent removings. The Act of Sederunt of 1756 gave the landlord the right, if his tenant was one year in arrears, "to bring his action against the tenant before the Judge Ordinary, who is hereby empowered and required to decern and ordain the tenant to find caution for the arrears, and for payment of the rent for the five crops following, or during the currency of the tack, if the tack is of shorter duration than five years, within a certain term to be limited by the judge; and failing thereof, to decern the tenant summarily to remove, and to eject him in the same manner as if the tack were determined." Mr. Vans Agnew's bill proposes to confer this right to caution, and power of removing in case of failure to find caution, upon the landlord at the end of six months instead of one year. In the pamphlet issued by the Chamber of Agriculture this Act of Sederunt is subjected to severe strictures: "Under this emphatically judge-made and questionable law, any farmer in Scotland, as soon as a year's rent becomes due, and without payment being asked, may be required to find security for the five following years' rents, and, on failure, is liable to be ejected, whatever the endurance of his lease." Without expressing any opinion on the justice or injustice of the provisions of the Act of Sederunt of 1756, constitutional questions at once raise strong objections to it. Lord President Boyle, in the case of *Graham* (5 D. 1210), expressed grave doubts as to whether the Court had any right to frame it, but added, "As it has been acted on for nearly a century, we must give obedience to it." This is not the occasion on which to discuss the constitutional question of whether this Act of Sederunt was *ultra vires* of the judges who made it, but this much we may say. Acts of Sederunt are made under authority bestowed on the Judges of the Court of Session by the Act 1540, c. 93. The authority thereby given is to make statutes for the ordering of processes and the expediting of justice. The Acts of Sederunt of 24th June 1665, as to protutors, 28th February 1662, as to executors-dative, and 14th December 1756, as to removing of tenants, are usually cited in the books as the leading instances in which the Court of Session exceeded, in the opinion of Scottish lawyers, the powers conferred

upon them by the Act 1540, c. 93. There can be no doubt that the subject-matter of an Act of Sederunt ought to be the regulations of judicial procedure. The Act of 1756 was something more than this, and the opinion of most Scottish jurists would, we think, be to the effect that it was, in point of fact, unconstitutional. At the same time, while fully sympathizing with the manner in which the Chamber of Agriculture censures it, we think the remarks of the Lord Advocate in the House of Commons on 19th March were perfectly just. His Lordship said: "There was an Act passed, not by the Legislature, but by the Judges of the Court of Session, in the year 1756, which practically regulated the matter. If a whole twelvemonth's rent be unpaid—and the practice then was to pay the rents yearly, and not according to the system of half-year's payment which has since sprung up—if it were unpaid, then the tenant might be brought at once before the local judge, who ordained him to find caution within a short time for the arrears then due, and also caution for five years' rent to follow, or to quit the farm at once; and if he was two years' rent in arrear, the lease was entirely extinguished and the tenant's right was at an end. That had often been called 'judge-made law,' and abused as such; and taken in conjunction with the right of hypothec, that certainly was somewhat severe, but those who blamed the Judges in that respect entirely left out of view that the older law of Scotland which prevailed in 1756 was very much harsher, and that the Judges of that period thought they were very much mitigating in favour of the tenant the rule which prevailed during the period of agricultural depression which followed the Rebellion of 1845." The earlier procedure is thus alluded to by Erskine (Inst. ii. 6. 45): "Little ceremony was observed some centuries ago in the removing of tenants. The landlord came to the door of the tenant's house at any time of that year wherein the tack was to expire with a wand in his hand, which having broke in two, as an evidence of his resolution to put an end to the tack, he warned the tenant verbally to remove at the ish; and if the tenant did not then remove voluntarily, the landlord might the very next day have ejected him, with his family and goods, *via facti.*" The Act of Sederunt of 1756 was then, in point of fact, made in the interests of the tenant farmers. We are, however, on the eve of further reforms. Apart from constitutional objections to the provisions of this Act of Sederunt, there is a strong feeling that on other grounds it is objectionable. "Through the combined use of this law and of the law of hypothec, a tenant who owes no arrear may have his whole stock and crop seized for coming rent; and being thus prevented from making sales to meet the rent, while his credit is at the same time destroyed, may be kept under the sequestration till a year's rent is due; the landlord may then require good security for five years' rent further, and if the tenant has no friends of adequate substance who will undertake that

alarming responsibility, he may be ejected in the middle of his lease, and his improvements and unexhausted manures appropriated without compensation. And after all the landlord may, and probably will, recover every penny of his rent under his hypothec, but the evicted tenant is never restored to possession. A legal robbery of the tenant and of the tenant's creditors may be thus effected, and they have no redress." So say the Directors of the Chamber of Agriculture, and we rather think that they are speaking the mind of the vast majority of Scottish agriculturists. This being so, a change is inevitable. The bill for the abolition of hypothec has passed its second reading, all the Scottish members present, with the exception of two, voting for it. Objection is taken to the second clause, which provides for bringing the law as to caution and removing into operation at the end of *six months*. We think this clause will be amended in Committee. What is desired by Mr. Vans Agnew, we do not doubt, merely is that if the rent is not paid, the landlord shall regain possession of the land. There can be no possible objection to this, and we think the Lord Advocate, than whom no one is better fitted to deal with this subject, may probably see his way to propose amendments which will settle the subject.

At the same time, the bill has not passed, and may not pass. The circumstances which attended the second reading were favourable. The general impression among members is that it is a tenants' question, and as the tenants (even including the small farmers, whom Lord Elcho thinks it will injure) are in favour of abolition, both sides supported the second reading. But the measure has to run the gauntlet of Committee, where amendments on clause 2 may raise much discussion, and also to be considered in the House of Lords, where it may not obtain so favourable a reception. Yet we cannot doubt that the ancient law of the landlord's hypothec has run its course. We think there is enormous force in one argument in its favour, namely, that to abolish it will very probably make a monopoly of farming. But the tenant farmers, great and small, seem unanimous against the law as it stands, while the landlords appear to be indifferent on the subject. In these circumstances abolition is inevitable.

RECENT DECISIONS OF THE COURT OF JUSTICIARY.

The High Court of Justiciary not only tries great offenders, but reviews the sentences passed upon very small ones. The stranger glancing over a volume of its Reports would be surprised to discover the variety of subjects which are submitted for the consideration of its judges. A Court which has upon its bench three Privy Coun-

cillors, has gravely to inquire into the composition of milk, the doings of publicans, of dealers in light or suspicious weights, of auctioneers, of despisers of the public health. Poachers by land and water are frequently before it. Many a bailie or J.P. finds his decision, which, in its author's opinion, could not have been improved upon by Solomon himself, treated with contempt and derision by this haughty tribunal, from which there lies no appeal. Here is the last resource of all the defeated litigants and convicted evil-doers in our petty courts. If they cannot bring their cases to this quarter by means of appeal or suspension, there is no hope for them in human justice. So closely does a considerable portion of its work border upon that which goes naturally to the Civil Courts, that, as all Scottish lawyers know, the Legislature had to step in and supply a test by means of which the appellant might know whither to direct his steps. And yet that section of the Summary Procedure Act leaves us still in the dark as to the distinction between civil and criminal.

Some of the next interesting, and, as far as concerns the general public, most important decisions of this Court, relate to quasi-criminal matters. Take an example. For years back our inferior judges in the large towns have been interpreting and administrating the Adulteration of Food Act in such a way as really to render the sale of adulterated articles dangerous, and to illustrate forcibly the truth of the old proverb concerning the superiority of an honest policy. But lately the High Court of Justiciary took up this matter, and have declared that Act a dead letter. The occupation of spies and informers who laboured for the public weal is gone; and you may sell milk-and-water for milk, and butterine in place of butter, with perfect impunity. It is impossible to over-estimate the importance of such a decision, either for the purchasers or the sellers.

In glancing over the reports of the last few months, we find a fair variety of specimens of the sort of cases which engage the attention of the Lords Commissioners, and we now propose to note several of these for the benefit of our readers.

In the case of *Hammil and Marr* v. *M'Arthur* (May 29, 1878) we find the magistrates of Kinning Park convicting two men for the offence of "playing on flutes, or some other musical instruments to the complainer unknown, the tune of 'Boyne Water.'" This action had been construed into a breach of the Police Statute, which prohibits the use of "any threatening, abusive, or insulting words or behaviour with intent or calculated to provoke a breach of the peace, or whereby a breach of the peace may be occasioned." The case affords a curious instance of how local circumstances may give colour to an act in itself unimportant, and apparently most innocent. In Kinning Park, with its population of Orangemen and Ribbonmen, it needed nothing in the shape of an innuendo to make the local magistrate comprehend the full enormity and danger of play-

ing any such tune. But when the case came to be discussed in the calm atmosphere of Edinburgh, "Boyne Water" was just a tune, "Boyne Water," and there was no sound precedent in the books for converting it into anything more. The Lord Justice-Clerk could remember a very unsound one. "To the effect of this conviction," he says, "I only remember one application of the law, and that one I should not be at all inclined to follow. In the trial of Muir and Palmer in 1793 it was proved against Muir that he had desired an organist to play the 'Ça Ira.'" Lord Craighill gave the opinion of common sense when he said, "In the view which I take of the Act it is necessary, in order to obtain a proper conviction, that the words of behaviour charged should be "threatening, abusive, or insulting," not in the estimation of passengers or residents in a particular neighbourhood, but in the estimation of the law itself." Consequently the conviction was quashed, and henceforth, so long as the rival parties content themselves with so innocent a weapon as a flute, they may use it without fear.

In the case of *Hogarth* v. *M'Dougall* (November 9, 1878) we notice an instance of the unreasonable construction which may be put upon a statute. A publican was convicted of selling or giving out drink on a Sunday, and lost his certificate because on that day he had given out some bottles of spirits in an open basket to be kept in a carrier's house all night for the purpose of being taken to the place of sale, where he had a licence, on the following morning. We need hardly say that their Lordships quashed the conviction. By the way, the most absurd displays of the judicial incompetency of the great unpaid are frequently connected with the public-house statutes. Is it because feeling runs so high when the liquor question is raised?

That it does not matter what superfluities your complaint contains, provided that it does contain what is competent and right, is the doctrine expounded in *Murray* v. *Campbell* (Nov. 9, 1878), where the judge was asked in a case of theft or reset, in alternative fashion, either to fine and award expenses or imprison. The judge convicted and gave sentence of imprisonment. On appeal Lord Young said: "The question is whether the form of the complaint was too comprehensive. But it contained all that was necessary under the statute (Summary Procedure Act), and all that followed was mere superfluity. Besides, it is admitted that it did no harm, and that the appellant suffered no prejudice from the form used. I think, therefore, that there are no objections made to render it possible for us to interfere with the conviction."

From the case of *Calder* v. *Robertson* (Nov. 9, 1878) it is plain that even where a landlord reserved rabbits in his leases, a tenant's servant killing them under his master's order will not be liable to a conviction under the Day Trespass Act. Lord Young observed that a farm servant cannot be expected to ask his master to show him his lease before he obeys an order to shoot rabbits.

In the *Lord Advocate* v. *Fraser* (July 15, 1878) we have a purely criminal case, presenting a tragedy fortunately rare, indeed we know of no other instance. The charge was murder. The accused had killed his own son, and the fact could not be denied. But the special defence taken was that he had done the fatal deed in his sleep. The evidence established that the prisoner laboured under a most aggravated form of somnambulism, which in the opinion of Dr. Yellowlees often developed a condition equivalent to insanity. And yet Dr. Clouston thought that there was no case of somnambulism which could be brought under insanity. The jury were told that the question whether somnambulism is a state of insanity was one with which they need not trouble themselves, and were directed to return a verdict finding that the panel had killed his child "in a state in which he was unconscious of the act by the reason of the conditions of somnambulism." Thus the Court have recognised that a man may be sane and yet not responsible for his actions. Whether or not it was a sufficient guarantee that the panel should undertake always to sleep alone may be doubted, but upon giving it along with his father, he was released.

The case of *Salmon and others* v. *Lord Advocate* (Nov. 15, 1878) is of great importance, both because of the points raised and because it was the first step in the most famous Scottish trial of recent times. The attention of the country has been called by it to the whole system of criminal procedure in Scotland, and the usual amount of ignorance upon the subject has been displayed. The conduct of this case seems to us to illustrate forcibly the strength and the weakness of that system. In the prompt arrest of the directors and decided course adopted from the first, we see the benefit of having always at hand machinery for the detection of crime and prosecution of criminals. Fancy the case happening in England, and the deliberation of the Treasury as to whether or no the case was one for their intervention, while actions were starting up in all directions at the instance of ruined shareholders. But on the other hand, had not the country possessed perfect confidence in the public officials, how unsatisfactory would have been the course followed. Everything was done in secret, and by means of a charge made against the prisoners, not substantiated even in a *prima facie* way before any public court, they were deprived of their liberty. It is obvious that such a system could very easily be used for evil, as indeed it has been in times past.

It is true that even at the earliest stage of a criminal prosecution in Scotland, the prosecutor is bound to submit his evidence to a judge. As the Lord Justice-General observed, speaking of the warrant by which the prisoners had been committed, "no such warrant is ever granted by a sheriff without full and deliberate consideration of the declaration of the prisoners and of the precogni-

tion of the witnesses examined for the prosecution." But there is nothing to satisfy the public, who must rest contented, as the Court in this case did, with the belief that both prosecutor and magistrate had been exercising wisely their discretion. The application for bail was based upon two grounds. It was contended, in the first place, that facts were not set forth from which a crime of theft not bailable could be inferred. The Court had not before them an indictment, but, as usual in such cases, only the petition upon which the commitment had proceeded. Now upon this point the opinion of the Court, as expressed by the Lord Justice-General, is important. "We are not," he says, "under such an application to deal with the question as if we were judging of the relevancy of an indictment. Unless the petitioners can satisfy the Court that the facts stated, even when cast into the more precise and detailed form of the minor propositions of an indictment, will be clearly and undoubtedly insufficient to sustain a charge of theft, they cannot demand liberation." In the second place, there was an appeal *ad misericordiam* of the Court. And here was exhibited that dislike to interfere with the discretion which must be vested in a public prosecutor. It was clearly indicated that any one appealing from the decision of the Lord Advocate must show reason for holding that bail has been refused to him for some illegitimate purpose.

Lord Young dissented, and stated a ground somewhat novel. According to him *furtum grave* was not a crime which inferred capital punishment, although such might be inflicted at the discretion of the judge. If it was not strictly a capital offence in Hume's time, it is certainly not one now. He does not overlook the fact that *furtum grave* has by decisions been declared to be a crime not bailable, but "the question," he says, "to which I have addressed myself in a matter of purely customary law, is whether now in this year 1878 it can be safely and truly affirmed that the former custom of Scotland, according to which theft was punishable capitally, has been completely superseded by another custom, now as firmly established, and on as good authority as ever it was, whereby (that is, without violating the custom) death may not be inflicted for that crime. This question no former decision can hinder me from answering, as I have done, in the affirmative." Lord Craighill remarked that this opinion seemed to apply an entirely different test from anything which has hitherto been applied by the law of Scotland, as to what is or is not a crime inferring "capital punishment," and this may be very true. But looking to the words of the statute, "that all crimes not inferring capital punishment shall be bailable," it may well be asked, is such a test unreasonable? In the case of *furtum grave* it is never the practice to restrict the pains of law, for the simple reason that no prosecutor ever associates very severe pains with the offence. But Lord Young indicated his approval of the decision of the majority, viewed as a question of discretion, being of opinion that the law of bail is unsatisfactory, and calls for amendment.

IMPLIED GRANT.

The subject of Implied Grant is one of increasing importance in the law of real property. The general principle that every grant of property implies a grant of accessory rights absolutely necessary to the beneficial enjoyment of the subject has long been established. At present we desire to direct attention to a subordinate or special principle in this title of law which has recently received some valuable illustrations in both England and Scotland. The question has been well stated in the technical language of English law by Mr. Goddard in his valuable book on Easements, which is practically a reproduction of the specimen Digest on that subject which he prepared on the employment of the Digest of Law Commissioners: "Whether an owner of land who has been in the habit of using apparent and continuous *quasi*-easements in his own soil during unity of ownership, does or does not grant or reserve a right to them by implication if he without any special stipulation, and without using any general words which could operate as a grant or reservation of them, conveys to a purchaser that portion of his land for the beneficial occupation of which he has been in the habit of using them, or reserves that portion, granting to a purchaser the *quasi*-servient tenement?" (Goddard on the Law of Easements, pp. 106, 107. 1870).

In *Pyer* v. *Carter* (Feb. 21, 1857, 1 H. and N. 916) the plaintiff and defendant were owners of adjoining houses which had originally been one house belonging to one Williams. During Williams' unity of possession he divided the house into two, the first of which he conveyed to Carter without any reservation, and the second of which some time after he conveyed to Pyer. Before and after these conveyances a drain or sewer ran under the part of the house which was conveyed to Pyer, and was continued under the part of the house which was conveyed to Carter. Water from the eaves of Carter's house fell on Pyer's house, and so down a spout into the sewer, which four years after the date of the conveyance Carter began to obstruct. The consequence was that Pyer's house was flooded. Pyer brought an action to declare his right to have the sewer continued. Carter did not know of the sewer being there when he bought his house. On the other hand, it was proved that Pyer could make a sewer for himself at a cost of £6. It will be observed that in this case there were no general words in the conveyance in favour of the plaintiff which could be founded on as passing expressly any accessory right. But though such words might have assisted the plaintiff in establishing a claim in the nature of warrandice against the seller, this circumstance was not important, because the conveyance in favour of the defendant having been first in date, and first followed by possession, the true question was whether the right to continue the use

of the sewer had been by implication (for there was nothing said about it in the defendant's conveyance) reserved in favour of the seller. If it had not been so reserved, of course it could not afterwards have been granted, whether by words or implication, in favour of the plaintiff. The two conveyances were not granted *unico contextu*; they were granted in favour of strangers, and could not be regarded as one transaction. The plaintiff's claim was sustained by the Court of Exchequer. Baron Watson in his judgment said: "It seems in accordance with reason that where the owner of two or more adjoining houses sells and conveys one of the houses to a purchaser, such house in his hands should be entitled to the benefit of all the drains from his house, and subject to all the drains then necessarily used for the enjoyment of the adjoining house, and that without express reservation or grant, inasmuch as he purchases the house *such as it is*. If that were not so, the inconveniences and nuisances in town would be very great. Where the owner of several adjoining houses conveyed them separately, it would enable the vendee of any one house to stop up the system of drainage made for the benefit and necessary occupation of the whole." He then refers to an early English case in which the right to water-pipes, which the seller had constructed from his adjoining land to a house, were held to pass with the house (granted with appurtenances, however), or to be contained in a reservation of the house from the sale of the land, because the right was "necessary and *quasi*-appendant thereto." With regard to the fact that Pyer might easily have supplied himself with another drain, Baron Watson said that "necessity" meant necessity at the time of the conveyance, and as matters stood without alteration. And the defendant's averment, that he knew nothing about the drain at the date of his purchase, was disposed of by a reference to the doctrine stated by Mr. Gale (Gale on Easements, p. 53), that by "*apparent signs*" must be understood not only "those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject." The reasoning of this decision is admirable and conclusive when applied to the construction of a grant of A subject to burdens in favour of B, an independent property held by a different owner on a different title. There, the rights of third parties in B cannot be affected by the conveyance of A, and therefore the contract between the seller and buyer of A is presumed to be subject to the burdens into which it was the duty of the buyer to inquire. But the reasoning hardly satisfies the case where the burden sought to be imposed was one within the power of the seller to discharge, because it depended for its existence on his own enjoyment of the adjoining properties, no interest having been created in a third party at the date of the conveyance.

In *Dodd* v. *Burchell* (24th January 1862, 1 Hurl. and Colt, 113) there was a passage down the side of the plaintiff's house, part of

which was covered by the first floor of the house, and into which a door opened from that house and also a door from the plaintiff's garden, which lay behind the house. Prior to the conveyance to the plaintiff, these doors and the passage had been used as the access from the house to the garden, though the garden could also be reached by a ground-window from the kitchen of the house. The passage led to a cottage built by the owner of the entire plot of ground. The cottage was first conveyed with dimensions stated in a plan which included the passage, not only at the point where the garden door stood, but for several feet under the first floor of the house. The conveyance gave a right of ingress and egress by the passage so far as not conveyed. Two years afterwards the house was conveyed "as the same was then held and enjoyed by the vendors," including a portion of the passage previously conveyed with the cottage, being that covered by the first floor of the house. Burchell, the disponee of the cottage, shut up the garden door opening into the passage, and Dodd, the disponee of the house, brought an action to have his right of entry by the garden door declared. It was argued for him that the right claimed was necessary for the reasonable enjoyment of the subject, and must therefore have been excepted out of the *ex facie* absolute conveyance of the cottage and premises as described in the plan. It did not matter whether the dominant or servient tenement was first conveyed. The Court of Exchequer refused to extend the doctrine of *Pyer* v. *Carter* to a right of way. Pollock, C.B., said that a right of way used and enjoyed during the unity of ownership would not pass on a severance of the tenements unless there was something in the conveyance to show an intention to create the right *de novo*. Baron Martin said that *Pyer* v. *Carter* had gone to the utmost extent of the law; and Baron Wilde said that "it would be most dangerous to hold that where a deed is silent as to any reservation of a way, it must exist as a way of necessity, because it is more convenient than another way."

In *Polden* v. *Bastard* (Nov. 28, 1865, L. R. 1 Q. B. 156) the testatrix was at the date of her death owner and occupant of a house in the yard of which was a well and pump. She was also owner of the house, outhouse, and garden immediately adjoining which were occupied by her tenant, Answood, whom she permitted for about twenty years before her death to use a footway leading into the yard, and thus to draw water from the well there for all his domestic purposes. There was no other existing supply of water, though there was a river 150 yards off, and water might have been got by digging 18 or 20 feet deep. The testatrix bequeathed to her nephew the first-mentioned house, which was in her own occupation; and to her niece she bequeathed the house second mentioned, "as now in the occupation of Answood." The nephew, or his successor, put up a fence across the path, and so cut off the water supply of the second house. On these facts it was argued for the

niece (1) that the words "as now occupied" were sufficient to pass the quasi-easement of *aquæ haustus*, just as the words "enjoyed by me," or "wherein I now live," etc., had frequently been held to pass outhouses, etc., though beyond the limits of the particular tenement conveyed by name; and (2) that the case fell under the rule of *Pyer* v. *Carter*. But C. J. Erle rejected this claim, because the words used were only words of specific description, and because the quasi-easement was neither necessary nor continuous, being exercised only from time to time.

In *Watts* v. *Kelson* (Jan. 16, 1871, L. R. 6 Ch. App. 166) the owner of two properties, A and B, had made a drain from a tank on B to a lower tank also there, and had laid pipes from the lower tank to A, on which were cattle-sheds. The tank was supplied by a natural watercourse flowing from B to A. In that state of unity of possession A was first sold with all "waters, watercourses, rights, privileges, advantages, and appurtenances whatsoever to the premises belonging, or with the same or any part thereof held, used, enjoyed, or reputed as part thereof, or appurtenant thereto." A subsequent purchaser of B stopped the supply of water in the pipes, the cattle-sheds on A having been supplanted by cottages. In this case the Court of Appeal held that the easement was continuous and passed, even apart from the very general words used. As L.-J. Mellish observed, "there was an actual construction on the servient tenement extending to the dominant tenement by which water was continuously brought." On the question of necessity, the Court thought it sufficient that no other supply of water equally pure, or equally convenient, could have been obtained. It is clear that *Watts* v. *Kelson* is not a very valuable illustration of the general principle of implied grant, because the general words of conveyance were very strong and comprehensive, and indeed were expressly said by the Court to be sufficient to pass the right to the water. Such words have in fact been extended so far as to include a right of way (which, as we have seen, being a right of occasional, not continuous, exercise, does not fall under the general principle of implied grant), at least where there was an apparent road completely or partially formed. But the main interest which for our present purpose attaches to *Watts* v. *Kelson* is that several of the Judges there took occasion to dissent from the opinion expressed by Lord Westbury in deciding the case of *Suffield* v. *Brown* (33 L. J. Ch. 249). In that case a harbour and a pier, originally belonging to the same owner, had been separately conveyed, first the pier and then the harbour. The second disponee claimed right to project the bowsprits of the vessels using the harbour over a portion of the pier. This had undoubtedly been the practice before the unity of possession was disturbed, and it was said to be necessary for certain vessels in certain states of the tide. It will be observed that the right was claimed, as in *Pyer* v. *Carter*, in virtue of an

implied reservation out of the first conveyance, for unless the right had been retained by the seller, he could not have granted it to his second disponee. But Lord Westbury laid down the principle that implied grant could only operate in favour of a purchaser, and against the granter, *i.e.* where the *quasi*-dominant tenement is first conveyed, and that a reservation of a *quasi*-easement on the first disposition of the *quasi*-servient tenement (which must, of course, be in favour of the original owner, where the two conveyances are not part of the same transaction) would be in derogation of the grant, and therefore could not be implied. This principle was repudiated (though without stating reasons) by the Judges in *Watts* v. *Kelson*, who were of opinion that the question in each case must be determined by a reference to the character and previous enjoyment of the right claimed, and that the date of the conveyances was immaterial.

Turning now to the law of Scotland, we must, of course, in the first place notice the leading case of *Ewart* v. *Cochrane* (13th Jan. 1860, and 11th April 1861, 32 Jur. 160, 33 Jur. 435, and 4 Macq. 117). In that case it appeared that for a period of sixty years prior to the date of action, water had flowed from a tanyard into a garden: that the tanyard and garden had been first made the subject of separate conveyances about forty years prior to that date, the tanyard being first conveyed by the original owner; the exercise of the right being recognised subsequent to the separation of the properties by an aperture being made for the drain in the boundary wall, and by the drain itself within the garden being covered up, at some expense, with the consent of the owner of the garden. The natural drainage outlet from the tanyard was not towards the garden, but apparently there was no natural outlet, and the drain had been originally constructed to prevent the accumulation of water on the tanyard. The tanyard was conveyed "as presently possessed" by the original owner, and a special servitude of access (not connected with the drainage arrangements) was reserved during the life of the seller. Upon these facts Lord Deas and the other Judges of the First Division held (founding partly on the case of *Preston's Trustees* v. *Preston*, 7th March 1844, 16 Jur. 433) that a servitude over the garden was constituted in favour of the tanyard. The judgment to some extent proceeded on the history of the arrangements subsequent to the separation of the properties, and Lord Deas stated the doctrine (repudiated by Lord Campbell on appeal) that a servitude could be constituted *rebus ipsis et factis*. But Lord Deas also said that "there must be held to have been an implied grant to the latter" (owner of the tanyard) "of the accessorial or servitude right of having the water carried off from the tanyard in the same direction as formerly—a right, however, which is to be used, like all servitudes, in the way least burdensome to the servient tenement, and which does not necessarily imply the permanent existence and use of the cesspool, or of

the same drain as heretofore, if the defender in the fair use of his property finds it necessary and can otherwise properly provide for the disposal of the water, but still a right which is not to be taken away at the mere pleasure of the defender, and without a substitute being provided for it." This case was carried to the House of Lords, where it was contended—(1) that the clause of parts and pertinents in the conveyance of the tanyard "as presently possessed" could not convey a servitude right which did not exist at the date of conveyance, before the unity of possession was severed; (2) that there was no necessity for implying a grant of the drain, because the drain was not essential to the enjoyment of the tanyard, but was originally made to keep dry a servitude road, which was made the subject of a temporary stipulation. In affirming the judgment of the Court of Session, Lord Chancellor Campbell distinctly repudiated the idea that a servitude could be constituted *rebus ipsis et factis.* He also threw out of the case the suggestion that there was a natural servitude of drainage in the case, because at most the facts amounted only to percolation. He said, "I consider the law of Scotland, as well as the law of England, to be, that when two properties are possessed by the same owner, and there has been a severance made of part from the other, anything *which was used and was necessary for the comfortable enjoyment of that part of the property* which is granted, shall be considered to follow from the grant if there be the usual words of conveyance. I do not know whether the usual words are essentially necessary, but where there are the usual words, I cannot doubt that this is the law." He then refers to the law of *Pyer* v. *Carter*, and states that from authorities quoted in argument the law of Scotland was ascertained to be the same. "When I say it was necessary, I do not mean that it was so essentially necessary that the property could have no value whatever without the easement, but I mean that it was necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant."

The most recent Scottish cases on the doctrine of *Cochrane* v. *Ewart* are *Gow's Trustees* v. *Mealls* (May 28, 1875, 2 Ret. 729) and *Alexander* v. *Butchart* (Nov. 26, 1875, 3 Ret. 156). The first of these was a case of great simplicity. Properties A and B were possessed by the same owner from 1814 to 1842. The natural access to the back court of A was through an arched pend on property A, but a close or lane on property B was also used as an access thereto, especially for carts. Apparently, however, there was no kind of access to A which could not be had by the pend as well as by the close. A was sold, and for twenty years after the sale both means of access continued in use as before. In 1863 the proprietor of A built up the pend, and continued until the date of action to use the close only for access to his back premises. The close was then obstructed by the disponee of B (whose right from the common author was subsequent

in date to the conveyance of A), and the Court held that this obstruction was perfectly lawful, because no right to use the close for entry had passed by implication on the conveyance of A when the unity of possession was severed. The reason of the judgment is obvious enough. As Lord Justice-Clerk Moncreiff said, referring to the doctrine of *Cochrane* v. *Ewart*: "It is not enough that a common proprietor should so use the subject as to infer that he was using one for the benefit of the other. It must be such a use as when the subjects are separated is necessary to the comfortable enjoyment of the subject." Here the claimant had destroyed a perfectly adequate means of access which he took under the express words of his grant, and there was, therefore, no necessity for appealing to the principle of implied grant in order to give the disponee a comfortable enjoyment of his subject. But even in such a case much of course would depend on the character and fixed uses of the subjects granted. Instances may easily be imagined in which a double access might be essential to comfortable enjoyment. In *Gow's Trustees* v. *Mealls* some of the Judges were to a certain extent influenced by the fact that prior to the unity of possession the subjects had originally been separate, and yet no servitude had been created for the benefit of the subject now claiming a *quasi* servitude. As, however, the periods of time were considerable, the character of the possession of both subjects may have entirely changed, and therefore in most cases this circumstance, viz. of the properties being originally separate, cannot be held entitled to great weight.

In *Alexander* v. *Butchart* the facts were equally simple. A house in Dundee was used on the first story as a shop, of which the signboard projected upwards considerably above the line dividing the first from the second story. The shop flat was first sold to Butchart, the tenant, "as presently occupied by him, with the whole pertinents." The upper portion of the house was then sold to Alexander, who brought a declarator and interdict against Butchart continuing the use of the signboard above the *medium filum* of the joists between the first and second stories (see the case of *Dickson* v. *Morton*, Nov. 23, 1824, 3 S. 310). Butchart did not even undertake a proof that the former position of the signboard was necessary to the beneficial possession of the shop, but seems to have rested his case on the proposition that a sign is a necessary adjunct of a shop, which may be generally true, but was certainly not adequate to the facts of the case, as a sign is generally placed upon the property signified, and not upon a neighbour's property. It may be observed that in this case both Lord Gifford and Lord Rutherfurd Clark reserved their opinion on the question, whether, assuming a servitude of this kind (not being one of the legal servitudes) to have been made the subject of agreement with the first purchaser, the agreement (express or implied) would have bound a singular successor in the remaining portion of

the property. This may be a difficult and undecided question, but principle would certainly point to the result that if the first right granted were made real in the manner prescribed by law, the preferable right would extend to all the incidents which the law annexes to a conveyance of property. There was a further difficulty behind the actual decision of *Alexander* v. *Butchart*, viz. whether, as in *Suffield* v. *Brown* (where the bowsprits projected over the pier), the easement claimed was a sufficient interference with the neighbouring property to bring it under the rule of *Cochrane* v. *Ewart* and *Pyer* v. *Carter*. It was certainly apparent and continuous, but it did not interfere with the enjoyment of the property invaded. So far as we know, no Scottish case has occurred in which the effect of implied reservation has been discussed, the conveyance of the *quasi*-dominant tenement having been always first in date.

Correspondence.

SUGGESTION FOR A SCOTS LAW INSURANCE COMPANY.

SIR,—Although sound insurance companies are nowadays pretty numerous, it can hardly be said that there are too many, and at all events authorities on the subject are agreed that there is still ample room for any new company which appeals to the interests of a class. Of this latter sort, no company, it is thought, has a better chance of success than one in which the holding of shares is restricted to members of the legal profession.

In England there are numerous examples of the legal proprietary company, such as "The Law Fire," "The Law Life," "The Equity and Law Life," "The London and Provincial Law Life," and "The Law Union Fire and Life." A very little trouble will show any one who chooses to look into the matter what a lucrative kind of business has been acquired by these companies, and it is not too much to say that they have all been very successful, and exceptionally well managed. The last-named company, which is the youngest of the lot (having been originated in 1854), may be taken as an illustration, and though only in its infancy, the remunerative character of the business transacted by this company may be gathered from the reserves already accumulated, the dividend it pays, and the price of the shares. It is the only Law Office in the United Kingdom doing fire and life business combined. The shares are £10 each with 12s. paid, and quoted at 45s., or nearly 300 per cent. premium, and are so highly appreciated that they seldom change hands, and can rarely indeed be got. The capital

"was subscribed by upwards of 500 of the leading members of the legal profession in England," and it may be assumed that the subscribers, or the greater number of them, when taking their shares, became also agents of the company.

There can be no doubt that lawyers have great opportunities of furthering insurances, greater indeed it is thought than any other class; and the advantages offered to them by a company of the kind indicated are manifold, including, among others, a commission on business introduced, good dividends on any shares they may take, an investment that will improve as the business improves, the reasonable expectation of a handsome bonus on their annual premiums should they insure their lives, and generally the usual advantages derived by policyholders and proprietors from bringing to the office an increase of sound and profitable business.

It is a curious fact that while lawyers in England have shown themselves so fully and profitably alive to the advantages of class offices, in Scotland we have as yet no single example of a legal proprietary company appealing specially to the profession. Were such a company influentially introduced, there is no reason why it should not be as successful, or even more so, than the numerous similar companies in England; and at all events, from the success of the English companies, it is evident that the members of the profession in Scotland are not so fully alive to their own interests as their brethren over the Border.

Having every confidence in the success of such a company, and in the hope that some one in influential quarters will take the hint and put the idea into shape, by the formation of "The Scots Law Insurance Company," for the transaction of fire and life business in the United Kingdom, I am, etc.

A WOULD-BE SHAREHOLDER.

[The suggestion of our correspondent is a useful one, and may possibly bear fruit some day. We fear, however, that the present time is hardly a suitable one for the formation of any new company, no matter how strongly it might be recommended, or however high the position of its promoters might be. It must be remembered also that the members of the profession in Scotland form a very much smaller body than they do in England. There is at present also an old and well-established company existing under the name of "The English and Scottish Law Life Association."—ED. *J. of J.*]

PROCURATORS ACT OF 1865, AND LAW AGENTS ACT OF 1873.

SIR,—Permit me to draw the attention of you and your readers to a conflict of opinion in the profession as to the position of

parties who passed as procurators and were admitted as such by interlocutors of Sheriffs under the Procurators Act of 1865, before the passing and coming into operation of the Law Agents Act of 1873, but who have not yet extracted the interlocutors admitting them on the usual £55 stamp. I hold with the great majority, notwithstanding the Law Agents Act, that it is still competent at any time for a party having an interlocutor in his favour by a Sheriff admitting him a procurator, dated before the passing of the Law Agents Act, to extract that interlocutor under the old system on a £55 stamp to entitle him to practise as a law agent, because by the 12th section of the Procurators Act the interlocutor admitting a procurator is declared to be a sufficient power and authority for him to act as such in all inferior courts; and moreover, all parties admitted in each sheriffdom by interlocutor of the Sheriff before the passing of the Law Agents Act, are or ought to have been returned by the Sheriff-Clerk of each county to the Registrar of Law Agents as admitted procurators, and entitled to a certificate of enrolment.

A few maintain that such parties must apply to the Court of Session to be admitted under the Law Agents Act, and to submit to a second examination, which is absurd. It is well known that parties having, before the passing of the Law Agents Act, only a report from the examiners under the Procurators Act finding them duly qualified for admission, will have to apply to the Court of Session, under the Law Agents Act, for admission, and are entitled to be admitted without examination under the Act if they applied before August 1876; but Lord Shand, while Lord Ordinary, decided lately that such a party is entitled on his producing such a report to be admitted without examination at any time, and after the date mentioned in the Act.

Could any of your readers enlighten the profession on the subject?—I am, etc. LEX.

Reviews.

Introduction to the Study of International Law. Designed as an Aid in Teaching, and in Historical Studies. By THEODORE D. WOOLSEY. Fifth Edition, Revised and Enlarged. London: Sampson Low, Marston, Searle, and Rivington. 1879.

THIS useful text-book or manual of public international law, which has now reached a fifth edition, is of American origin. American lawyers have, in the matter of authorship, made the field of public international law peculiarly their own. Their political constitution

—the union of a number of territorial states and the frequent questions of conflicting jurisdiction arising therefrom, have necessarily compelled more than ordinary attention to be directed to the principles which underlie this department of jurisprudence. And there has been no failure to treat it in a scientific spirit. The treatises of Wheaton, Kent, and Halleck have justly become standard authorities, referred to as such in every disputed international question.

This edition of Mr. Woolsey's work gives a very succinct and accurate description of the present state of international law. The aim of the author, as expressed in his title and preface, has been to produce a book which will be useful to students of international law and history. In this we think he is very successful, both the arrangement and statement of the matter leaving little to be desired. The author has evidently carefully studied and digested all the authorities from Grotius downwards. The views of modern Continental publicists, such as Heffter and Bluntschli (neither of whose works, unfortunately, are yet translated into English), have full justice done them. Mr. Woolsey's work is, however, something more than a collection and digestion of authorities; his own views, which he occasionally expresses, are well worthy of consideration. He does not hesitate, on occasion, to express his dissent from some doctrines which have found special favour in America, as, for example, the treatment of savage races by civilized states based on a sort of negation of rights.

Since the Treaty of Paris in 1856 very considerable changes and modifications in the rules of international law have occurred. In this department no less than in others does the maxim hold good that law is a progressive science. Steam and electricity are exercising gradually the most astonishing influences on the relations of nations to one another. Man is becoming less the patriot and more the cosmopolitan. The censure or approbation of its neighbours are becoming the predominating influences with every civilized state in regulating its conduct. This silent change is all for good. As nations get to know one another better they hate one another less. National antipathies die out before the universal expansion of commerce and trade. The "Alabama Arbitration" is the most notable illustration of this progress of international law. Despite some soreness at the result, this country can now look back on the proceedings in that arbitration with nothing but feelings of satisfaction. It undoubtedly saved the world much suffering.

That bugbear of modern politicians, the "balance of power," is described by Mr. Woolsey as follows: "The meaning of the balance of power is this: that any European state may be restrained from pursuing plans of acquisition, or making preparations looking towards future acquisitions, which are judged to be hazardous to the independence and national existence of its neighbours. In further explanation of the system we may say—(1.) That it matters not whether the actual ratio of power between states is in

danger of being disturbed by unjust or by just means, provided only the means are political, not economical and strictly internal. If, for instance, the sovereign of a powerful state should in a just way seat one of his family on the throne of a neighbouring state, the justice of the transaction would not be a sufficient protection against the interference of other powers. (2.) That acquisitions outside of Europe have not hitherto been drawn into this policy. England has by degrees become a predominant power in several quarters of the globe without provoking the interference of the Continent. The reason is that foreign acquisitions affect the political balance only in an indirect way. (3.) The system has been applied to power on the land, and not much to power on the sea. England has acquired, undisturbed, a great predominance on the sea, while the balance of power has been in full exercise. The reason is obvious. Power on the sea cannot directly control the political relations of Europe, nor destroy the independence of states. (4.) The system has not yet been carried out beyond the borders of the European states, Turkey included. The reason is that the transatlantic states have not only come at a recent period into the European international system, but can as yet have no appreciable influence in European affairs" (sec. 44). The last of these four divisions seems a mere repetition of the second, but otherwise this is as distinct a statement as this most undefined and undefinable doctrine of international law admits of. The balance of power has had many unrighteous wars fathered upon it. Its limits are of a very dubious kind. If one might judge from the aggrandizements of Prussia, and the quiet absorption of Alsace and Lorraine into Germany, one would say the balance of power was effete; on the other hand, the attitude of Europe in the recent Russo-Turkish war points to a different conclusion.

One of the most interesting points in public international law, viz. the extent of a nation's right of property or jurisdiction over the sea, was raised in the recent well-known case of the Franconia. The Franconia, a German vessel, sailing from one foreign port to another, ran down the Strathclyde, a British vessel, within two and a half miles of Dover, killing several people. The Franconia, being injured, had to put into a British port for repairs, and the captain was thereupon arrested, put on his trial for manslaughter, and convicted. On appeal, however, the conviction was quashed on the ground that the captain was "a foreign subject, on a foreign ship, on a foreign voyage, and on the high seas at the time the offence was committed, and so not amenable to the laws of the country." Though the decision was based on considerations of municipal law, the whole arguments and judgments in the case are extremely instructive as bearing on the international rule of the three-mile limit of territory at sea, and they are well worth studying. Mr. Woolsey refers to this case (sec. 57).

In characterizing his book as an "Aid in Historical Studies," the

author does so, we think, very properly. No one can pretend to understand thoroughly modern history without some knowledge of public international law. And indeed the converse is equally true. The two should be read and studied together. There are two useful appendices to this edition: the first containing a brief selection of works and documents bearing on international law; the second, a list of the most important treaties since the Reformation, with a brief statement of their provisions.

On the whole, we do not know any introduction to public international law better adapted to students than this work. We have not observed any Americanisms in style, though in orthography there are one or two, as "offense," "fulfill," "blamable," which do not commend themselves to English readers.

Handbook of Procedure and Redress at Law; for Professional and General Use. By WILLIAM SPINK, S.S.C. Edinburgh: William Paterson. 1879.

MR. SPINK has produced a volume which has the merit of being concise, clearly written, and arranged on rather a novel principle. It is also intended seemingly as a "popular" guide to the practice of the Courts, and though it does not at all attempt to make "every man his own lawyer," still there is much in it which the intending litigant may read with profit. The first chapter is entitled "Notes about going to Law," and contains many good hints and much sound common sense put into a very readable form. We are afraid, however, that some of the statements in it must be received with caution; to what mode of procedure, for instance, does the author refer when he says, "The Court of Session also in the Inner House gives decree without proceedings in cases submitted to it, if the parties are agreed about the facts; *and where they are not agreed —upon giving in only summons and defences—one juror may try the issue, and his finding as to the facts is final*"?

The introduction is followed by a short sketch of the Court of Session and the procedure therein, and then we have a long *précis* of the Procedure Acts, each subject being arranged under its appropriate heading alphabetically, the different sections containing a summary of the various statutes dealing with the subject to which they refer. Considerable skill and ability have been shown in the arrangement and the condensation of the information into a small space: the system has the advantage of affording easy reference, and the reader sees at a glance what the statutory requirements are in regard to the matter he is engaged with. The procedure in appeals to the House of Lords is not forgotten, though the Acts regulating them are not summarized in the same way. The minor Courts and their procedure are next discussed, and the remainder of the volume is chiefly taken up with a summary treatise on actions and dili-

gence, and procedure and redress under special statutes: the paragraphs in this chapter are also arranged alphabetically, according to their subject, beginning with "Adherence" and ending with "Wrongous Use of Diligence." There is also a chapter professing to be a dictionary of terms, pleas, and maxims in legal procedure: this is not quite so well executed as the other parts of the book: the words and phrases seem rather arbitrarily selected, some phrases being omitted which we should expect to find; why, for instance, have we not the phrase "*res judicata*," when *res gestæ* is given? Surely most of Mr. Spink's readers would know that the *status* of a man means his condition or rank in life without having to consult the pages of this volume for it. Under *intoxication* we find the following: "This is a plea sometimes advanced for reducing a deed. The intoxication must be to such an extent as to deprive the party for the time of the direction of his reason." Now this information, though good enough in its way, is out of place in a dictionary, which professes to give *definitions*; it does not define intoxication even in its legal sense; law, we are afraid, cannot be written in this *staccato* form.

But we must leave the thankless task of fault-finding to say, in conclusion, that although this volume may not rank high as an authority on points of practice, yet we have no doubt that it will be found useful by not a few. The young lawyer will find it convenient to have by his side, as in many cases it may answer all the purposes of more voluminous treatises without entertaining such an amount of trouble in searching for the information. Notwithstanding the alphabetical arrangement of its contents, an index would not, we think, have been out of place, as there is no means of reference to the subjects contained in the chapters not arranged in the manner indicated. The size and style of the volume are very convenient, quite bearing out its title as a *Hand*-book.

The Month.

Spring Vacation Arrangements.—Circuits.—The following are the Circuits which have not already been held:—

NORTH.—LORD JUSTICE-CLERK and Lord CRAIGHILL. *Dundee*—Wednesday, 2nd April, at 12. *Perth*—Friday, 4th April, at 12. *Aberdeen*—Tuesday, 8th April. *Inverness*—Thursday, 10th April, at 12. Alexander Blair, Esq., *Advocate-Depute;* Mr. M'Cosh, *Clerk.*

WEST.—Lords YOUNG and ADAM. *Glasgow*—Tuesday, 6th May, at 2. John Burnet, Esq., *Advocate-Depute;* Mr. Macbean, *Clerk.*

Bill Chamber.—The following Judges are on the Roster for the ensuing vacation:—

Friday, March 21, to Saturday, April 5, LORD GIFFORD.
Monday, April 7, to Saturday, April 19, „ SHAND.
Monday, April 21, to Saturday, May 3, „ RUTHERFURD [CLARK.
Monday, May 5, to Saturday, May 10, „ CURRIEHILL.

Box-Days.—Thursday, 3rd April, and Wednesday, 23rd April, have been fixed as the box-days.

Lady Lawyers.—At last we are to have the "gown" at the bar as well as on the bench in the United States Supreme Court. The bill permitting any woman, who shall have been a member of the bar of the highest court of any State or Territory, or of the Supreme Court of the District of Columbia, for three years, and shall have maintained a good standing, and who shall be of good moral character, to be admitted, on motion and the production of the record, to practise in that court, has become a law. Originating in the House, it was reported adversely in the Senate, but passed by a vote of thirty-nine to twenty, with seventeen absent. Mr. Hoar, in winding up the debate, said:—

"The greatest master of human manners who read the human heart, and who understood better than any man who ever lived the varieties of human character, when he desired to solve the knot which had puzzled the lawyers and doctors, placed a woman upon the judgment-seat; and yet, under the existing law, if Portia herself were alive, she could not defend the opinion she had given, before the Supreme Court of the United States."

We quite agree to that, for Portia's opinion was indefensible in law; and we prophesy that a good many such will be evolved under the new rule.—*Albany Law Journal.*

Ladies in Court.—The late excellent Judge, Justice Cresswell, had the failing of addressing his brother Judges in a somewhat consequential and authoritative manner, which much annoyed Maule. Leaving the Court of Common Pleas one day in disgust whilst one of those performances was going on, he met Lord Campbell, and remarked, "There's that fellow Cresswell talking to the other Judges like a magistrate talking to three black beetles!" Any one who knows the appearance of the learned Judges during a winter term, in their black cloth robes and narrow ermine trimming, will better see the full force of the remark. He would never allow the Court to be cleared of females even during the most disgusting trials. "Decent women don't come into courts of justice," he would remark. "Speak out, my poor girl," we once heard him say, "it must be very painful for you to go into all the bad language and disgusting detail, but it is necessary to the ends of justice; and besides, all these finely dressed ladies here" (point-

ing to the High-Sheriff's lady and others who sat on the bench beside him) "have come miles to hear what it shocks a poor innocent girl to repeat!" We were present and heard this, and record that five minutes afterwards there were very few "fine ladies" indeed beside the sarcastic little Judge upon the bench.—*Leisure Hour.*

The French Police.—As the civil and criminal procedure of Scotland had at one time an intimate relation to those of France, and as the influence of the latter country is still observable in much of our law, the following account of the French police may not be uninteresting to our readers:—

"The noise that is being made in France over the reorganization of the Prefecture de Police suggests some gossip anecdotes concerning that remarkable institution which has been supposed to have an ubiquitous eye. It is lodged, as everybody knows, in a block of buildings which forms part of the Conciergerie and the Palace of Justice, and seen from outside presents a no more imposing appearance than Scotland Yard. But once you have passed the stone archway which fronts the Quay de Harlay and is guarded by a sentinel—once you have entered the wide door at the end of the yard through which so many thousands of criminals have passed on their way to prison, the galleys, or the scaffold, you have only to note the height of the buildings, the array of barred windows, and the number of officials, turnkeys, and policemen who flit about to understand that you are in a big place of many uses. The beautiful gilt steeple of Saint Chapelle, built at a time when the Palace of Justice was the residence of the Kings of France (the vestibule leading to the Court of Assize was once Louis IX.'s or St. Louis's kitchen), towers in the background, and to the right is the Conciergerie, or depôt for all prisoners awaiting trial. The arrangements for the centralization of the whole criminal business of Paris are capital, and when the law courts are completed, it will perhaps be found feasible to copy them.

"Every person arrested in Paris is taken before a commissary of police, and if that functionary sees cause for detaining him, he is consigned to a cell in the police station pending his transfer to the Prefecture. Twice a day the yellow-and-black police vans start from the Rue de Jerusalem and go the round of the eighteen stations to collect prisoners, who on their arrival are first searched, and then relegated, according to their means or their alleged offences, either in cells or in one of two of the big common rooms. A well-to-do prisoner, who can afford to keep himself, is put *à la pistole*, *i.e.* in a decently furnished room, where he has a bed, sheets, etc., and where he can have his meals brought to him from the canteen or from outside the prison. Pauper prisoners, again, who are charged with very heinous offences, such as murders, and whom it is thought desirable to keep *au secret*, are locked up in cells by themselves, or else are allowed the companionship of one other prisoner, who is a *mouton*, or spy. The *mouton* is always a convicted felon, who, in return for some indulgences, assists the police by worming secrets out of prisoners. He must be a clever fellow, for he carries his life in his hand in playing his dangerous game. Habitual criminals scent a *mouton* at once, and there are many instances of terrible thrashings administered to these unsavoury rogues whose testimony is very reluctantly admitted in courts of justice, but is always listened to by examining magistrates, or *juges d'instruction.* Ordinary criminals who do not require watching—petty thieves, drunkards, vagrants, brawlers—are sorted according to the clothes they wear; the very dirty kind into one room, the decently clad into another. Both rooms are alike—long, spacious chambers, warmed by stoves, and floored with asphalt. A gallery runs round them, about twenty feet from the floor, and here two or three

warders walk to and fro constantly. These officials never go down into the room itself singly, lest they should be mobbed and crushed—a thing which happened pretty frequently in old days before the present arrangement was adopted. If a riot should occur—as, for instance, when one prisoner, recognising another whom he suspects of having betrayed him, falls upon the latter—the warders go into the room in a strong body, escorted by municipal guards with loaded rifles, and collar the offender, who is transferred to a dark cell. In a general way, however, order is kept in the common room by one of the prisoners whom the warders elect for his strength of limb and smartness, and who, in consideration of a daily ration of wine and tobacco, is appointed doorkeeper. This means that when the name of any prisoner is called, either for a visit or for an examination by the *juge d'instruction*, the doorkeeper has to find him and bring him to the door, where a pair of *gendarmes* are in waiting to receive him. The same prisoner has to keep order in the exercise-yard (*préau*), where all the prisoners are turned out for an hour's exercise twice a day; to tell off fatigue parties to empty the pails in the morning, and to preside over the distribution of food. There are two meals a day—bread and soup each time. At night the prisoners sleep side by side on plank beds running all round the room, which are used as settees during the day, each man being allowed a rug. In the female wing of the Prefecture only the lowest and foulest of women are put into the common room, but in the male wing the dandified youngster who has only been guilty of some freak resulting from a night orgie, is mixed up with the cracksman and the sharper, the pickpocket and the fraudulent clerk. A man may remain about a week in the common room, but seldom more. At the end of the time he is either discharged with a caution, or, if the Procurator decides on prosecuting him, he is transferred to La Mazas pending his trial at the assize, or before the Court of Correctional Police. In any case he is brought back to the Conciergerie on the night before his trial, and remains there so long as his trial lasts. Assize prisoners whose trial lasts more than one day sleep in cells.

"The Prefecture has a special department called the "Infirmary," for suspected lunatics. Men who are reported to the police as being presumably mad are brought here to be examined by a couple of doctors, who sometimes detain them for a day or two, or else send them on to the great lunatic depôt, St. Anne's Hospital, where they are kept under observation until the State doctors agree upon releasing them or consigning them to a madhouse. The lunatic cells at the Prefecture are dark and dismal; but this is a complaint that can be made against all others in the building, for they are mostly under ground. The Prefecture has no less than three stories of cells and offices under ground. Passing from the criminal wards of the edifice, a privileged visitor may be allowed to see a number of curious chambers connected with the criminal business. Firstly, the Chambre des Dossiers, an apartment where are classed, in alphabetical order, boxes containing the papers which treat of the antecedents of all the persons who have got into trouble during the last sixty years or more. The Communists destroyed a good number of these *dossiers*, but they were unaware that duplicates of them were stowed away in the cellars. After this comes the Black Museum, which is a repository of all the implements of murder or robbery, the unclaimed valuables, etc., found upon prisoners at the time of their arrest—a very queer museum this is. Next we have the photograph-room, where there are albums containing the likenesses of thousands of habitual criminals, and to each carte a number is affixed referring the searcher to a book of particulars and to the criminal's *dossier*. The photographs of those who happen to be very urgently wanted by the police at the moment are kept in frames on the table, so that all the detectives may examine them as they pass by the room. A sort of property museum stands contiguous to the photographic chamber, and is chiefly remarkable for the vast number of umbrellas which it contains. At the end of a year and one day these waifs become the property of the finder, or else are sold at a public auction. Passing on to another suite of rooms, one comes to

the library of impounded books and newspapers, which used to be overfull in monarchical days, but is now only used as a receptacle for publications *contraiers aux bonnes mœurs.* Once a month all this literature is put into caldrons of boiling water, and after being well soaked is pounded in big mortars, the paste being sold to papier-mache makers. Of the other departments of the Prefecture it is scarcely necessary to speak, though a visitor who crossed the entrance-yard might get a bewildering idea of the multifarious business of this establishment if he could guess the errands of the many strange folks he will meet coming in. Organ-grinders, acrobats, and cabmen coming for licences, released convicts coming to report themselves, licensed victuallers who have been summoned to get a scolding for petty delinquencies, strangers who have lost wives, children, or dogs, and want them found; complainants who have been beaten or robbed—all these, and many more, furnish forth the bulk of daily and hourly visitors to an establishment which has a staff of nearly three hundred detectives, and rules more or less over the police of all France."—*Daily News.*

The Scottish Law Magazine and Sheriff Court Reporter.

COURT OF SESSION.

Second Division—*Tuesday, March* 11.

APPEAL—MOIR *v.* MAITLAND.

This was an action raised in the Sheriff Court of Aberdeen and Kincardine, at the instance of James Moir, farmer, Mains of Wardhouse, in the parish of Insch, against Mrs. Agnes Reid or Maitland, wife of William Maitland, residing at Shannaburn, in the parish of Maryculter, and the said William Maitland, for his interest, for payment of £136, 14s. 10d., which had been paid by the pursuer to Messrs. Robertson & Lumsden, advocates in Aberdeen. In 1869 the defender, Mrs. Maitland, being desirous of assisting her brother, but having no private means of her own, apart from a legacy of £1000, left to her by her father, exclusive of her husband's *jus mariti* and right of administration, and which was not payable till the sale of the estate of Muirton, wrote Messrs. Robertson & Lumsden, factors on her father's estate, as follows: "Messrs. Robertson & Lumsden, advocates, 3 Union Terrace, Aberdeen, 10th April 1869. Dear Sirs,—I will be much obliged if you will advance me £100, and retain that sum out of the money coming to me from my father's estate. The rate of interest on the loan to be that charged by the banks on overdrawn cash accounts. Mr. Moir's obligation and receipt for the money I shall hold binding on me and my husband.—Your obedient servant. (Signed) Agnes Maitland." Messrs. Robertson & Lumsden agreed to make the advance asked, on condition of the pursuer granting the following receipt: "Aberdeen, 10th April 1869.—Received from Messrs. Robertson & Lumsden the within-mentioned sum of £100, which I will see repaid to them, with interest at the rate within mentioned. (Signed) James Moir."

Upon this receipt the money was, at Mrs. Maitland's request, handed to the pursuer, who applied the same as agreed on between them.

Various circumstances having prevented the sale of the estate of Muirton, Messrs. Robertson & Lumsden called upon the pursuer to repay the £100, he having previously paid the interest on it, and accordingly on 7th January 1876 the pursuer repaid the money. The estate of Muirton was sold and settled for in 1877, and at Martinmas of that year Mrs. Maitland was paid her legacy, but

when the pursuer applied to her for repayment of the sums paid by him to Messrs. Robertson & Lumsden, she refused to do so, and the pursuer was obliged to raise the present action.

The Sheriff-Substitute (Dove Wilson), after hearing parties' procurators, issued an interlocutor on 9th July 1878 repelling the defences; but, before issuing decree, appointing the pursuer to restrict the prayer of the petition in certain respects. He appended the following note:—

"*Note.*—If the obligation which is founded on by the pursuer could be regarded as being simply a personal obligation by the female defender, it would be null. *Harvey* v. *Chessels* (21st February 1791, Bell's Cases, 251) decides this. The same case, however, makes it clear that if the obligation, though also a personal one, be framed so as specially to bind the wife's separate estate, it is good in so far as it does that. This is in conformity with the older case of *Ellis* v. *Keith* (15th December 1665, M. 5987).

"The question in this case therefore comes to be, whether the obligation founded on is one which binds the female defender's separate estate? If it does, the male defender has no right to object to his wife having granted it without his consent (his right of administration being excluded), or to object to her being forced to pay it out of her separate estate (his *jus mariti* being also excluded).

"In considering whether the obligation affects the wife's separate estate, the nature both of the obligation and of the estate must be taken into account.

"The obligation founded on was granted by the female defender originally in favour of the agents for her father's trustees. The pursuer was cautioner to the agents for it, and at their request he retired it. The pursuer is therefore entitled in equity to plead against the granter of the obligation everything which the original grantees could have pleaded.

"Under her father's settlement the female defender was entitled to a legacy of £1000 sterling, free from her husband's *jus mariti* and right of administration, and payable when a certain estate was sold. There being some delay in selling the estate, and she being desirous of having money in the meantime, she requested the agents for the trust to advance her £100 sterling, and 'to retain the same out of the money coming to her from her father's estate.' The advance was accordingly made. It does not seem to me doubtful that if, when the estate came to be sold, the agents for the trust had been the creditors, they would have been entitled to retain the amount due to them, from the money passing through their hands to the female defender. At the time the obligation was granted, the right to the legacy, though payment of it was not due, had emerged, and the interest which the female defender had in it was capable of being assigned. It was also her own, to do what she liked with. If this be so, it cannot be doubted that the letter to the trust agents formed an effectual assignation of her right to them, to the effect of securing their advance.

"If it be the case that the agents for the trust might have retained the amount from the legacy had it been still in their hands, the question remains, whether their taking payment from the cautioner and then paying the legacy in full to the female defender can affect the pursuer's right.

"Supposing the cautioner had taken steps to enforce his right before the legacy was paid over, he could have arrested it in the trustee's hands; the grantee's right to retain and the cautioner's right to arrest being exactly equivalent. The circumstances under which the legacy was received, without the pursuer resorting to arrestment, I think are such as in equity to prevent their being founded on. The pursuer avers that he refrained from taking any such steps as arrestment in consequence of distinct promises from the female defender that she would pay the amount as soon as she got the legacy, and this averment she admits. After these promises she can found nothing on the fact of the money having been actually paid to her. In regard to the husband, as the money was never his, it seems to be immaterial whether it is now in the trustee's hands or in those of his wife.

"The obligation says nothing about the interest being retained, but as the

interest was an accessory to the principal, the right which the agents for the trust had to retain the principal would have included a right to retain for the interest; and, as I have already said, I think the cautioner (having paid) is entitled to take the same position as they could have taken.

"The purpose to which the wife applied the money seems to me not to have any bearing on the case. The money was her own, to do what she liked with, and if she chose to help her brother with it that was a kindness she was entitled to do, even though it may have been (as her husband says) a foolish kindness. When a wife is dealing with a fund secured to her free of her husband's *jus mariti* and right of administration, she is not limited to the application of it exclusively to purposes which benefit herself.

"For these reasons, I think the pursuer is entitled to get repayment of his advance out of the female defender's separate estate. But before decree can be pronounced, the prayer of the petition will have to be amended. It contains references to the grounds of action which are excluded by the Act of 1876, and it is too wide, inasmuch as, if it were granted as it stands, it would authorize diligence against the person of the female defender, or even possibly against funds other than those secured. J. D. W."

An appeal was taken by the defenders to the Sheriff-Principal, who pronounced the following interlocutor:—

"*Edinburgh*, 15*th October* 1878.—The Sheriff having heard parties' procurators on the defenders' appeal against the interlocutor of 9th July, and considered the record, recalls the said interlocutor; sustains the defenders' first plea in law; assoilzies the defenders from the conclusions of the action; finds them entitled to expenses, of which allows an account to be given in; and remits the same, when lodged, to the auditor for taxation. J. GUTHRIE SMITH.

"*Note*.—In 1869 the defender, Mrs. Maitland, was desirous of assisting her brother, Mr. Reid. She had no money available for the purpose, but under her father's will she was entitled to £1000, which would become payable to her on the sale of the estate of Muirton.

"The agents of the trust, Messrs. Robertson & Lumsden, at her request gave Mr. Moir, the pursuer, the sum of £100, on the footing, apparently, that they were to be at liberty to retain it out of the legacy when it became payable, and on condition also of Mr. Moir being himself answerable for it, and he agreed to apply the money in payment of some pressing claims against Mr. Reid, which it was Mrs. Maitland's wish should be discharged. And had the transaction retained this shape, there might be room for saying that it was nothing but payment by anticipation to Mrs. Maitland, the person entitled under the will, and the husband's *jus mariti* and right of administration being excluded, it was binding on her even although she is a married woman.

"But in point of fact the legacy has been paid in full. Mr. Moir has repaid the advance of £100 to Messrs. Robertson & Lumsden, and he now sues the defender on the ground that he paid it away in accordance with her directions.

"In substance, therefore, it is an action for money paid to or for behoof of another, at the request of a married woman without her husband's consent.

"The Sheriff is of opinion that such an action is not maintainable. The money was not expended *in rem versum* of the wife, or in discharge of obligation for which she was liable. And it is laid down by all the authorities that personal obligations by a wife, without the consent of the husband, are void. J. G. S."

Against this the pursuer appealed to the Court of Session, and the action has now been taken out of Court by joint minute for the parties, the defenders paying the whole sums sued for—principal, interest, and expenses.

Act.—Allan.——*Alt.* Duncan.

SHERIFF COURT OF ZETLAND.

Sheriff THOMS and Sheriffs-Substitute MURE and RAMPINI.

Rev. ALEXANDER ARTHUR, Teacher of Gritquoy School, Unst, against Rev. WILLIAM SMITH, Minister of the Parish, and others, the Managers of the School.

In this action a new point as regards the Education (Scotland) Act and the right of teachers to the grant technically know as "19 D" has been made the subject of decision.

The first interlocutor was pronounced by Mr. Mure, who lately resigned the Sheriff-Substituteship of Zetland, and was as follows:—

"*Lerwick, 6th May* 1878.—The Sheriff-Substitute having heard parties, and made avizandum, and considered the record, proof, and productions: Finds in point of fact (1) that the pursuer was appointed teacher in 1873 of the Gritquoy School, Unst, in connection with the Education Committee of the Church of Scotland; (2) that he was not then, but in 1874 became a certificated teacher, and being so, obtained the Government grant given in aid of education; (3) that in consequence of the provisions in the English Elementary Education Act of 1876, sections 19 (2 and 3) and 53, a special grant was inserted in the code issued by the Scottish Education Department in 1876 and subsequent years as additional for schools in thinly-peopled districts, and that such special grant is part of the annual grant to schools for each year; (4) that the Education (Scotland) Act of 1872, section 67, and the code following on it, which regulates denominational schools, entirely distinguish between building grants and annual grants, and that under the building grant provision is made for grants by the department for building, enlarging, improving, and fitting up schools; (5) that in the code for 1877, section 17 (1), it is made a condition of the annual grant that the income of the school be applied only for the purpose of a public or State aided school, and that under that it is forbidden to expend any part of the annual grants on outlay on the premises beyond ordinary repairs; (6) that the grant 19 D appears to be in the same position as the other annual grants, all of which, except 19 D, have been paid to the pursuer, through whose work and exertions they have been all earned, and that the purpose of said grant appears to be further to help education and teachers in thinly-peopled districts; (7) that the said Gritquoy School ceased to be a school in connection with the Education Committee of the Church of Scotland in July 1877; (8) that thereafter and in September 1877 the defenders applied part of the said grant, 19 D, towards building a porch to said school, while the rest is retained as a reserve fund to uphold the school; (9) that the Education Committee of the Church have made special grants for upholding said school: Finds in point of law that the defenders, being managers of said school, and therefore in the position of trustees, were not entitled to apply said special grants to building purposes, and that the pursuer is entitled thereto, and has a right to sue for said grants: Therefore the Sheriff-Substitute decerns the defenders to pay the pursuer the sums concluded for in the petition, together with interest as concluded for: Finds the pursuer entitled to expenses, allows an account thereof to be lodged in process, and remits the same to the auditor of Court to tax and report. ANDREW MURE.

"*Note.*—From the report of the Education Committee of the Church 1870, it is clear that the Committee held out the inducement to the teachers employed by it that they would receive the whole of the annual Government grants. The pursuer, having obtained a certificate, was entitled to these, and the defenders, who became necessary to the school in consequence of the terms of the 67th section of the Education Act of 1872, are bound to administer the grants in terms of the code. Gritquoy being a denominational school, the managers' acting must be regulated entirely by the 67th section of the Act of 1872, subsection (2), and the relative Scotch code. The interpretation which the Sheriff-Substitute puts on the code may be gathered from the interlocutor.

"The defenders deny the pursuer's title to sue, and maintain that there is no contract between them and him. That is true in itself, but being managers they are in the position of trustees, and hold the fund as such, and must distribute it in terms of the code. The pursuer is in the position of a beneficiary suing trustee, and does not require any special contract to enable him to maintain his right. As to the destination of the grant 19 D it is annual income of the school; the Education Committee of the Church of Scotland will not touch it; the managers must apply it in terms of the code; and the pursuer by whose labour it was earned seems entitled to it. A. M."

The defenders appealed to the Sheriff, who recalled the above judgment *hoc statu*, and remitted the cause to have the record amended and additional proof led. Thereafter the Sheriff-Substitute (Rampini) pronounced this interlocutor:

"*Lerwick, 27th November* 1878.—The Sheriff-Substitute having heard parties' procurators, made avizandum, and considered the record, proof, and productions: Finds in point of fact (1) that the pursuer was appointed teacher in 1873 of the Gritquoy Denominational School, Unst, under a contract entered into between him and Professor Simon Laurie, Secretary to the Scottish Education Committee; (2) that in 1874 he became a certificated teacher of the fourth class, and from that time down to the period of the severance of his connection with the school received the Government grants in aid of education known as 19 A, 19 B, and 19 C; (3) that in 1876 a special grant, 19 D, was established in aid of schools in thinly-peopled districts (Scottish Code for 1876, p. 9; Code for 1877, p. 10); (4) that such grant appears to be of a different character to grants 19 A, B, and C, and that it was within the power of the defenders to apply it at their discretion for the purposes mentioned in the Elementary Education Act of 1876, secs. 20 and 53; (5) that a portion of the said grant was appropriated by the defenders in September 1877 in a manner not contemplated by the said Act: (6) that the said Gritquoy School ceased to be a school in connection with the Education Committee of the Church of Scotland in July 1877; and (7) that no portion of the grant 19 D has been paid to the pursuer: Finds in point of law (1) that the pursuer is not entitled either in terms of his contract, or in respect of the misappropriation by the defenders of a part thereof, to claim any portion of the grant known as 19 D; and (2) that the defenders are not *quoad* the pursuer in the position of trustees: Therefore assoilzies the defenders from the conclusions of the petition; Finds them entitled to expenses, allows an account thereof to be lodged in process, and remits the same when lodged to the auditor of Court to tax and report, and decerns. "CHARLES RAMPINI.

"*Note.*—The pursuer alleges that the defenders are *ex officio* trustees for the Gritquoy School, and that he is as regards them in the position of a beneficiary,—in other words, that the grant 19 D is his own, that it never was the defenders', and that they are now acting illegally and fraudulently in keeping him out of his money. The pursuer asserts in fact that he possesses a *jus crediti* giving him a personal action against the trustee. It cannot, the Sheriff-Substitute thinks, be maintained that an actual and valid trust exists in the person of the defenders. Such an estate could only be established by writ or oath of the trustee (Act 1696, c. 25). The trust attempted to be set up is an implied or equitable one, and the pursuer thinks that it may be established *prout de jure*. But the Sheriff-Substitute is aware of no legal authority to support such a contention. Mr. Macgregor admitted he was unable to cite any. There is here no question between the trustee and the debtors or creditors of the truster which could let in such a proof; nor is there in the whole case the slightest tittle of evidence to create or establish anything approaching to a trust in the defenders.

"The pursuer's next ground for his contention is based upon implied contract. But can that be maintained here? So far as it could be rested upon the acts and deeds of the defenders there is no ground for such an assertion. The

defenders never admitted, indeed they always disputed, the pursuer's right to the grant 19 D.

"The contract was made between the pursuer and Professor Laurie, as Secretary of the Scottish Education Committee in 1873. The pursuer was to receive a certain salary, but nothing appears to have been said about Government grants. The pursuer, not being a certificated teacher, was not entitled to claim them. Had he been so, they would have gone to him as a matter of course. In 1874 he obtained a certificate of the fourth class, and from that date grants A, B, and C were regularly paid over to him as they were received by the managers. Grant 19 D was only established in 1876, and could not therefore have been *in terminis* of the contract within the contemplation of parties at the date at which it was entered into in 1873. But the pursuer thinks that having hitherto received grants A, B, and C without cavil he has a right to 19 D as well.

"There is, however, an essential difference between the character of the grant 19 D and the preceding ones. Grants A, B, and C are made 'per scholar,'—19 D is a special grant, and one which is not to be taken into account in making a reduction under article 32 of the code. All are payable to and may be claimed by the managers; all are earned by the exertions of the teacher; but the first three are in their nature grants to the teacher, the latter to the school (Scottish Code, 1877, pp. 8-10). The managers could doubtless, and might with propriety, have paid over the grant 19 D to pursuer, but its disposal was within their own discretion (No. 16 of process). They were certainly bound to apply it as well as all other Government grants in a particular way (Scottish Code, 1878, p. 7, Elementary Education Act, 1876, secs. 20 and 53, quoted at foot of p. 8 of code of 1878); and in applying a portion of 19 D to the building of a porch they seem to have acted *ultra vires*. But that does not of itself give the pursuer a claim to this grant. If the managers have erred in the exercise of their discretion, has the pursuer thereby acquired a right to compel them to correct their error in the way in which he thinks it ought to be done? The Sheriff-Substitute is unaware of any authority to support this proposition.

"The Sheriff-Substitute regrets to notice that the joint-minute of admission of books and papers referred to in the Sheriff's interlocutor of 4th July 1878 has not been put in."

The pursuer appealed this judgment to the Sheriff, who pronounced this interlocutor :—

"*Lerwick, 24th Feb.* 1879.—The Sheriff having resumed consideration of the pursuer's appeal, with the reclaiming petition and answers (Nos. 34 and 35) and whole process: Sustains said appeals and recalls the interlocutor submitted to review: Finds (1) that the individual defenders were in June 1875, in the meaning and sense of the 67th section of the Education (Scotland) Act, 1872 (35 and 36 Vict. c. 62), managers of the school of Gritquoy, to whom annual Parliamentary grants, according to the rates and under the conditions contained in the minutes of the Scottish Education Department in force for the time (Scottish Code, sec. 7 *b*, and sec. 15 *c*), might be and were made and paid as after-mentioned; (2) that on or about 30th June 1874 the pursuer, who then held the office of teacher in said school, and was the acting teacher in the district, became qualified as a certificated teacher (see Ans. to Act v. of Condescendence), and the conditions (duly imposed as regards the defenders obtaining any annual Parliamentary grants) of the Scottish Code, sec. 17 (1), that 'the principal teacher is certificated, and is not allowed to undertake duties not connected with the school which occupy any part whatever of the school hours, or of the time appointed for the special instruction of pupil teachers,' and (2) that the *first* grant to a school shall be computed from the date at which the acting teacher passes the examination for a certificate, were thereby purified; (3) that in consequence the defenders received for the period dating from the pursuer's so becoming certificated, viz. 30th June 1874, and ending 31st May 1875, a Parliamentary grant under the

Scottish Code (as per Inspector's Report, No. 13 of process, produced by defenders) of £16, 15s. 6d., which they paid over to the pursuer upon their receiving it or shortly thereafter; (4) that for the period of thirteen months, which ended 30th June 1876, a Parliamentary grant under the said code (as per Inspector's Report, No. 14 of process, produced by defenders) of £19, 10s. was received by the defenders, which they paid over to the pursuer upon their receiving it or shortly thereafter; (5) that for the period of one year, which ended 30th June 1876, a Parliamentary grant, under the said code, as it had been altered to give effect to the provisions (particularly section 19) of the Elementary Education (Scotland) Act, 1876 (39 and 40 Vict. c. 79), but the amount of which nowhere appears, was received by the defenders, of which there is in the defenders' hands as yet unaccounted for the sum of £16, 5s., which, with interest thereon, is one of the sums sued for in this action, the balance having been paid over to the pursuer; (6) that for the period of one year, which ended 30th June 1877, a Parliamentary grant, under the said code as altered, of £30, 6s. (per Receipt, 15 of process) was received by the defenders, of which they have only paid over to the pursuer the sum of £15, 6s., leaving in the defenders' hands as yet unaccounted for the sum of £15, which, with interest thereon, is the other sum sued for in this action, the balance having been paid over to the pursuer; (7) that these two last-mentioned sums in the defenders' hands could, under the said code as altered, only be earned by school managers who had in their employment a certificated teacher such as the pursuer then was, and who was teacher of a school recognised by the Education Department, where the population of the school district, or the population within two miles, measured according to the nearest road from the school, was less than 200 (see Elementary Education Act, sec. 19); and (8) that these two last-mentioned sums were not building grants, but the grant mentioned in the said code as altered, and known as 'Grant 19 D,' and they could not be applied in any outlay on the school premises beyond the cost of ordinary repairs, and fall to be expended by the defenders in defraying legal charges applicable to the education of the year for which each was granted, and any discretion in the defenders as to the application of these sums must be so limited: And with reference to these four last findings allows the defenders within ten days from the date of this interlocutor to lodge an account (with vouchers of sums paid), detailing any expenditure which they claim to have properly made, or which they may legally make, out of the said two sums of £16, 5s. and £15: And in the event of said account and vouchers being lodged within said period, allows the pursuer within seven days thereafter to lodge objections thereto, reserving all question of expenses. GEO. H. THOMS.

"*Note.*—This case, as it has now developed itself, does not rest on any contract made in 1873. The Act of Parliament of 1876 for the first time authorized the special annual grants (known as 19 D) which are here in dispute. The object of this grant has to be gathered from the indications which the language of section 19 of the Elementary Education Act (which came into operation 1st January 1877) supplies. In the interpretation of this section of the Act there is valuable aid afforded by the Education Department in their code for 1877. The object was to encourage a teacher in a thinly-peopled district to go, it might be, to their own homes or elsewhere than to school, in order to afford children education. Accordingly the code says, 'When the number of scholars so instructed by one such teacher and presented to the Inspector reaches fifteen the managers may claim a grant of £10 in addition to the amount earned by examination;' and the grant is to be increased if the number of scholars so taught is greater. This provision of the code further states what the Sheriff holds to be the true position of the defenders as managers. They fall to claim the grant (see sections 43 and 67 of the Education Act of 1872), but only for the purpose of applying it to educational purposes during the year; and looking to the duty which a teacher is expected to discharge in the case where grant 19 D is made, payment for his services must be one—if not the primary—purpose to

be met out of it. By section 36 of the Education Act of 1872 the School Board or managers, even in the ordinary case, 'shall maintain and keep efficient every school under their management,' which can hardly be done without properly remunerating the teacher. A note by the Education Department in the code for 1877 at the grant 19 E strengthens this view of the managers' duty, 'This grant should be divided between the teacher and pupil teachers in such proportions as the managers may determine.'

"The Sheriff observes from the new edition (seventh) of Mr. Sellar's book just published (Appendix, p. 440) that the Education Department has issued a circular, dated 26th June 1878, which adopts the same view as to the teachers' pre-eminent claims to share in grant 19 D.

"The managers, however, have a discretion within legal limits, and it is to admit of the defenders stating how they have exercised, or propose to exercise, it as regards the two grants 19 D in dispute that the present order is made. They had an opportunity afforded them of doing so in their answers to the reclaiming petition, but they have not availed themselves of it. The Sheriff observes that Professor Laurie in his evidence desired to explain 'that in the circumstances of the Gritquoy district, and so far as known to me, the grant 19 D might have been fairly made over to the teacher after deducting the expense of cleaning and heating the school and paying for any necessary educational apparatus,'—that is, of course, if these expenses have not been defrayed out of other sources. The Sheriff may extend the deductions so as to embrace other expenses, if such have been paid by the defenders in connection with the teacher's labours in educating the children of the thinly-peopled district of Gritquoy. But the defenders must not include in the account now ordered their expenditure on the school porch, as the Sheriff agrees with both Sheriffs-Substitute Mure and Rampini that the expense cannot be legally defrayed from grant 19 D. G. H. T."

The defenders in consequence lodged a minute, in which they stated that "as the Sheriff holds that these grants must be applied for the year for which they were earned, the minutes are therefore unable to give the particulars referred to in the interlocutor. But the defenders hold that as they are sued as managers for the Gritquoy School for the Education Committee of the Church of Scotland, and as that Committee has paid the pursuer a salary of £25 for each of the years ending 30th June 1876 and 30th June 1877, the grants may be held as applied *pro tanto* in payment of these sums, and obtain receipts from the Committee therefor." No answers to this minute were lodged.

The Sheriff's interlocutor and note disposing of this minute were as follows:—

"*Lerwick*, 31*st March* 1879.—The Sheriff having considered the minute for the defenders, No. 36 of process: Finds that the aforesaid sums of £16, 5s. and £15 have not been claimed from the defenders by the Education Committee of the Church of Scotland, and that there is no purpose, other than the payment of the pursuer, for the years ending 30th June 1876 and 30th June 1877, to which the aforesaid sums of £16, 5s. and £15 can now be legally applied: And therefore decerns and ordains the defenders conjunctly and severally to make payment to the pursuer of the said sums of £16, 5s. and £15, with interest thereon at five per centum per annum, from the 30th day of January 1878, the date of citation in this action, until the date of this decree (being all that is concluded for in this action), with expenses, as these may be taxed, but subject to modification by deduction of one-fifth part thereof. GEO. H. THOMS.

"*Note*.—The above modification of expenses has been made in consequence of the extra expense to which the new record and additional proof have led.

"G. H. T."

SHERIFF COURT OF INVERNESS.

Sheriff Ivory.

LORD MACDONALD AND OTHERS v. THE COMMISSIONERS OF SUPPLY OF COUNTY.

Process—Contravention of Act of Sederunt, 1839.—This action was raised before the Sheriff Court of Portree to compel the erection of a bridge and roads in room of a bridge and the roads leading thereto, which had been carried away by a flood. The Sheriff held that the Commissioners of Supply were doing all that was possible and necessary in the circumstances by providing temporary accommodation. The strong local feeling which led to the action may be judged of from the following interlocutor of the Sheriff:—

"*11th March* 1879.—The Sheriff having considered the minute for the pursuers, dated 25th February 1879, Finds that the said minute, while professing to tender certain 'explanations' and to make 'statements of fact' to the Court, is truly an elaborate argumentative pleading against the recent judgment of the Sheriff, mixed up with misstatements of fact, and is contrary to the regulations of the Act of Sederunt and the rules of procedure in force in the Sheriff Court: Finds that the said minute was published by the pursuers in the *Inverness Courier* two days at least before it was handed to the Sheriff Clerk Depute with the view of its being lodged in process: Finds that the said minute was lodged in process by the Sheriff Clerk Depute without the permission of the Sheriff, in contravention of the 64th section of the Act of Sederunt of 10th July 1830: Therefore orders the said minute to be withdrawn from process: Appoints this interlocutor and the note appended hereto to be published forthwith in the *Inverness Courier* and other newspapers (if any) in which the pursuers' minute was published: Finds the pursuers liable in all expenses incurred by the defenders or Sheriff Clerk Depute in connection with the said minute, including the expense of publishing this interlocutor and note in the *Inverness Courier* and other papers: Allows an account of the said expenses to be given in, and remits to the auditor to tax the same and report.

"W. I.

"*Note.*—The Sheriff is surprised that any procurator in the Sheriff Court of Inverness-shire should have been so ignorant of the rules of Court as to have tendered in the form of a minute, with the view of being lodged in process, what is in reality a long argumentative reclaiming petition against the Sheriff's own judgment. He regrets also that the Sheriff Clerk Depute should have received such a document into process in contravention of the Act of Sederunt. The duty is imposed on the Sheriff in such circumstances of 'ordering peremptorily' the pleading to be withdrawn, and of imposing such award, or awarding such expenses as may seem proper. (A. S. 10th July 1839, S. 65.) The Sheriff has no alternative, therefore, but to order the pursuers' minute to be withdrawn from process.

"But if the pursuers' procurator committed an irregularity in handing to the Sheriff Clerk Depute an informal minute, for the purpose of the same being lodged in process, he has been guilty of a much more grave irregularity in publishing in the public newspapers a full copy of his minute; and that not only before it was allowed by the Sheriff to be received into process (which it never will be) but several days even before it was tendered to the Sheriff Clerk Depute.

"The Sheriff doubts whether he is not acting too leniently in the circumstances, in refraining from imposing a fine on the pursuers' procurator, in terms of the Act of Sederunt, for acting as he has done. But he considers himself justified in confining himself to a strong expression of disapproval of such conduct, as he believes that the pursuers' procurator had no intention of doing anything improper or disrespectful, and that he acted as he did in ignorance, and when smarting under the observations in regard to his own conduct

and that of the other pursuers, which the Sheriff felt himself bound to make in the note to his last interlocutor. Should the offence, however, be repeated after the above expression of opinion on the part of the Sheriff, he will be forced to adopt a much more severe course.

"The Sheriff has received from the Sheriff Clerk Depute a letter from the defenders' procurator, dated 3rd March 1879, asking to be allowed an opportunity of answering the pursuers' minute, 'as it contains statements in fact which they, the defenders, believe to be unfounded,' and stating 'that the petitioners, or their agent, had been more than once assured, before the minute recently disposed of by the Sheriff was lodged, that contracts for the Hinistle Bridge were entered into, and that Captain Fraser had personally expressed to Mr. Paterson, the general inspector of roads, his entire approval of the acts of the respondents.'

"The Sheriff regrets that, as he has thought it necessary, in conformity with the rules of Court, to order the pursuers' minute to be withdrawn from process, the defenders will have no opportunity of answering the misstatements of fact therein contained. This is, no doubt, a hardship for the defenders, and shows the impropriety and injustice of the pursuers' conduct in publishing their minute in the public newspapers in the way they did. The Sheriff would gladly do all in his power to counteract the evil effects of the pursuers' improper conduct, and for this purpose he thinks it right to give all possible publicity to the defenders' denial of the pursuers' so-called 'statements of fact,' and to the defenders' own statement of fact contained in the above-mentioned letter, by ordering this interlocutor and note (in which they are fully quoted) to be published at the pursuers' expense, in those newspapers which contained the pursuers' minute. He feels bound at the same time to give expression to his own belief that the defenders' denial of the pursuers' statements is justified in the circumstances, and that the defenders' own statement is true.

"The Sheriff regrets to be obliged to add that after a careful perusal of the pursuers' minute, and the elaborate attempt to justify their conduct therein contained, he still adheres to the views stated in his former note, and remains of opinion that the pursuers acted most unreasonably in complaining (1) of the defenders' delay in erecting the permanent bridge, (2) of the defenders' failure to repair the temporary roads, and (3) of the risk of the temporary bridge being shut up under the processes of interdict, and of the public being deprived of the use thereof: the truth being (1) that the erection of the permanent bridge was delayed solely in consequence of the severity of the weather; (2) that the pursuers were, during the whole time in question, and still are, insisting in the said processes that the defenders should be interdicted from repairing the roads; and (3) that the pursuers were, during the said period, and still are, insisting in the said processes that the bridge should be shut up, while the defenders have all along resisted this to the utmost of their power. W. I."

Act.—Macdonald.——Alt.—Maclennan.

SHERIFF COURT OF ROSS-SHIRE.

Sheriff-Substitute C. G. Spittal.

H. AND J. MACRAE *v.* MACRAE.

Held that interest does not run on merchants' accounts until citation.

The following is the note to the Sheriff-Substitute's interlocutor in this case:—

"In this action the pursuers, merchants in Glasgow, sue the defender, a retail dealer in Stornoway, for the sum of £11, 3s. 5d., alleged to be due on an account for goods supplied by the pursuers to the defender in August and September 1877. The defender does not dispute liability for the price of the goods, but the account annexed to the summons includes this item, 'To interest, 10s. 6d.' That item must, in my judgment, be disallowed.

"The question whether, as a general principle of law, interest is chargeable on merchants' accounts, and if so, from what point of time, has not yet been formally settled by the Supreme Court; and it appears from a collection of Sheriff Court cases recently published by Sheriff Guthrie that in the various Sheriff Courts of Scotland the question is variously decided. From the cases of *Aberdeen Commercial Company* v. *Jordon*, and *Macfarlane* v. *M'Leod* (Guthrie's Cases, pp. 227-230), it appears that the Sheriffs-Substitute of Aberdeenshire are in the habit of allowing interest on merchants' accounts, while the Sheriff-Principal of Aberdeenshire gives effect to the view that interest does not run until after citation. In *Benhar Coal Company* v. *Henderson* (Guthrie, p. 234) one of the Sheriffs-Substitute (Lees) of Lanarkshire decides against the claim of interest. In all these cases reference is made to the case of *Cardno and Darling* v. *Stewart* (9th July 1869, 7 Macph. 1026); and in *Macfarlane* v. *M'Leod* the Sheriff-Substitute comments upon the inaccuracy of the report of the case of Cardno in the Session Cases, and refers, for a correct report of the judgment, to the *Scottish Law Reporter*, vol. vi. p. 670. Now I quite agree with him in preferring the report in the *Scottish Law Reporter* to that given in the other two series of reports; for not only, like Sheriff Lees, who decided *Benhar Company* v. *Henderson*, was I present in Court when the case of Cardno was discussed and decided, but I wrote the report of the case for the *Scottish Law Reporter*, and I know the report of this judgment to be correct. I, like Sheriff Lees, understood at the time, although the point was not formally decided, that the opinions of the judges were against allowing interest on merchants' accounts, and I fail to see anything in the case of Cardno, as reported in either set of reports, to countenance the view that interest is legally exigible on merchants' accounts. It is no doubt somewhat unsafe, when a point is merely discussed, without a formal decision being come to on the matter, to aver what the decision of the Court would have been; but my impression was very strong at the time that, had the point fairly arisen for discussion, the Court would have rejected the claim for interest. Acting, therefore, upon my understanding not only of the decision in the case of Cardno, but also of the views indicated by the Court during the discussion of the case, I have always refused to allow interest on merchants' accounts in the absence of any special circumstances preventing the application of the general rule of law.

"In two of the Sheriff Court cases cited above the authority of Erskine and Bell is quoted as proving that merchants' accounts bear interest, and the case of *Bremner* v. *Mabon* (13th Dec. 1837, 16 S. 213) is relied on in support of that view.

"Erskine (iii. 3. 80) says, 'Where no term of payment is stipulated, *e.g.* in an open account, decree is generally awarded for the interest from the time at which the account ought to have been regularly paid, viz. after the elapsing of a year from the date of the last article.' And he refers to the case of *Grant* v. *Lady Newmore*, 1754, reported in Elchies. A note in Macallan's 'Erskine' adds that where goods were sold, not in retail, but in slump, to be again retailed, interest was allowed only from citation, the Court thinking that every case is to be judged of by its own circumstances (Miller, 15th Feb. 1754; Elchies, *voce* Annual-rent, No. 15). That, it may be observed, is precisely the case now before us, the defender here being a retail dealer, purchasing in slump for sale by retail.

"The *dictum* of Professor Bell in his Principles, sec. 32, is, 'Interest is due as damage from delay raised by a judicial demand or protest upon his rendering of accounts,' etc. And he refers, on the matter of accounts, to the case of Bremner above cited. In his Commentaries he says more explicitly, 'Interest on merchants' accounts of furnishings begins on the expiration of the accustomed credit; or, if there be no special custom to regulate it, from the date of citation when the money should have been paid.' Now it appears to me that Bremner's case by no means warrants the statement that interest runs on merchants' accounts either from the date of rendering or from any other date prior to citation.

that he had been in the practice of doing so from the commencement of his lease. Of this he was allowed a proof, and after hearing the agents of the parties, the Sheriff-Substitute pronounced an interlocutor in the following terms:—

"*Perth*, 15*th December* 1878.—Having heard parties' procurators, and made avizandum with process, proof, and debate: Finds, as matters of fact, First, the defender, by contract of lease between him and the Earl of Kinnoull dated the 6th and 8th days of July 1876, of which No. 6 of process has been held to be a true copy, the defender became tenant of the farm of Kildinny for nineteen years from the term of Martinmas 1875. Second, by said lease there was reserved to the proprietor the game which may be upon the lands let during the lease, according to the definition of game inserted in the Act 25 and 26 Vict. c. 114, and the tenant renounced all claims of damages which might be competent to him in respect of the said game. Third, the said recited Act expressly includes 'rabbits' under the definition of game. Fourth, that by disposition dated in 1878, of which No. 7 was held to be a true copy, the Earl of Kinnoull disponed to the pursuer the lands of Ardargie, including the lands of 'Jack's Chairs,' which is admitted to form part of the farm of Kildinny, leased to and possessed by the defender, and the right to the defender's lease was thus conferred on him so far as applied to the portion of the farm called 'Jack's Chairs.' Fifth, the pursuer on the 30th July presented a petition to the Court, craving interdict, and averred that on or about the 7th June the defender illegally authorized and instructed Ewan Robertson, joiner, residing at Kildinny, to shoot rabbits on the said lands of 'Jack's Chairs,' and he did shoot a rabbit or rabbits thereon, and that the defender had maintained that he had a legal right to kill the rabbits on the said lands and threatened to continue to do so; and the defender, in defence, admitted that he instructed the said named person to shoot rabbits on the said lands for the purpose of protecting the crops thereon, and that he shot one rabbit, but he denied the pursuer's averment *quoad ultra*. Sixth, on 14th June, and prior to the institution of this action, the defender wrote to the pursuer the letter No. 5, to the effect that, in consequence of the gamekeeper having challenged one of his servants, he had instructed his man not to go back, and to which no answer was returned by the pursuer. Seventh, the pursuer, in course of the preparation of the record, judicially agreed that, if the defender consented to interdict being pronounced against his killing rabbits on the lands of 'Jack's Chairs,' he would be satisfied therewith, and would ask no expenses against the defender. But the defender declined to accept the offer, but expressed his willingness that, if interdict was not asked and his expenses paid, he would consent to the case being dismissed. Eighth, the defender, on the record, averred that the Earl of Kinnoull, through his factor and gamekeeper, authorized him to kill down rabbits, and he set up a plea founded on that averment of right. Ninth, Finds the pursuer has failed to prove that the defender at the date of the action maintained his right to kill rabbits, and using any threat to continue the practice. But the defender has failed to establish any abandonment by the landlord of the restrictive clause in the lease, or permission to violate the same. Therefore, and in respect of the stringent nature of the clause in the lease, and the defender's plea that the same had been departed from, grants the interdict craved: Reserving any competent action to the defender for damages, and the pursuer's defences there against, as accords: Finds the defender liable in expenses, subject to the modification of one-fourth, and remits the account thereof to the auditor to tax, and decerns. HUGH BARCLAY.

"*Note.*—There is no question, at common law, a tenant-farmer, either by himself or another, may shoot down rabbits as vermin for protection of his crops. Though much was said as to Robertson not being properly an agricultural servant, it does not in the least matter that he had not exactly that character. He may be said to have been a servant on the farm, though not having exactly the character of a farm-servant. The letter written to the pur-

suer by the defender was not absolutely a declaimer of his rights to kill rabbits on his farm, but that he had merely instructed a particular person not again to shoot them. That letter certainly was entitled to an answer, and the pursuer has not attempted any evidence that the defender threatened to repeat the act of slaying the rabbits. Had the defender come into Court with the simple averment that he disclaimed all right and intention to destroy rabbits, but looked to damages as his remedy, then, in the absence of any proof of threat and the unanswered letter, the defender might have been entitled to costs. But, unfortunately, he joined issue on his right to shoot rabbits founded on express permission from the original landlord, in whose right the pursuer stands. It might have been a question whether, if such permission had been proved to have been given by a former proprietor, it would be binding on the pursuer; as also, whether the right being founded on writing it could be taken away by parole. The defender has signally failed in proving the absolute permission. Whatever be a tenant's rights at common law, and however monstrous and inequitable the clause of prohibition in the lease, yet, if a tenant agrees to such a covenant, he cannot at his own hand violate the prohibition. H. B."

The defender appealed to the Sheriff against this interlocutor, and his Lordship, after hearing parties, pronounced the following interlocutor:—

"*Edinburgh*, 19*th February* 1879.—The Sheriff, having considered the debate and whole cause, affirms the interlocutor of the Sheriff-Substitute appealed from: Dismisses the appeal, and decerns. ROBERT LEE.

"*Note*.—The respondent's pleadings (particularly plea No. 2) make it impossible to refuse the interdict as unnecessary. Although the letter No. 5 indicates that the respondent had previously taken up a very reasonable position, he seems to have departed from it on record, and even to have gone the length of leading evidence in support of the allegation upon which his second plea is founded. The Sheriff concurs with the Sheriff-Substitute in holding that, in these circumstances, some expenses must be given to the pursuer, but that the finding should be subject to modification. R. L."

Act.—Skeete.——Alt.—Whyte.

SHERIFF SMALL DEBT COURT OF PERTH.

Sheriff BARCLAY.

MACLEISH *v.* REID.

This case was at the instance of William MacLeish, Town Clerk, Perth, against Robert Reid, South Street, Perth, as representing the American Meat Company, for slaughter-house dues payable by the defender to the pursuer's constituents, the Police Commissioners of Perth, in respect of carcasses of cattle slaughtered beyond the distance of two miles from the boundaries of the burgh, and brought by the defender within the boundaries for sale or consumption therein. The claim was founded on the 363rd section of the Police and Improvement (Scotland) Act, 1862. The Sheriff gave decree, accompanied with the following note:—

"*Perth*, 6*th March* 1879.—The defender pleads that in law he is not liable, because the dead meat had been brought from America under some new process of preservation. The question is novel and rather nice. It is not surprising, therefore, that a judgment has been given by a much-respected Sheriff adverse to what the Sheriff-Substitute has now, with every attention to the case, arrived at. He is not moved by any considerations that such a traffic could not have been in the view of the Legislature when passing the Act of 1862. The question must be decided solely on a sound construction of that statute. As a citizen the Sheriff-Substitute would have been very happy indeed could he have reached an opposite conclusion. It affects important considerations of the food question and of free trade, and the evil of monopoly

and restriction of trade. But a judge must banish all such views of policy. He is forbidden to make, but only to declare the law—*jus dicere non jus dare.* Looking then at Part V. section 13, of the Act 1862, he is compelled to find for the pursuers. Section 358 empowers the Commissioners to provide and establish shambles, and for that purpose to borrow on security of the rates to be taken and raised for the use of such shambles. It is admitted that the Commissioners of Perth have provided shambles at great cost. Having done so, section 363 must regulate the question now raised. The first part of that section prohibits the slaughtering of cattle within the burgh, or within two miles of its boundaries, under a heavy penalty. This is not limited to the sale of the carcasses within the burgh, but obviously extends to all slaughter of bestial, though for private consumption. This is a very penal clause, and gives a monopoly to the Commissioners in favour of their public shambles. Following up this clause is the one founded on by the pursuers, making all persons bringing in for sale or consumption the carcass of any beast slaughtered beyond the two miles liable in payment of the same dues as are leviable for cattle slaughtered in the public shambles. There is a limit rendering persons liable in the penalty of not using the public place. There is no limit in the second clause, but only that parties who without the limit bring carcasses within the burgh for sale shall be equally dealt with as those who use the public shambles. There is no distance set forth. If the defender's contention was sustained, it might be of advantage for a person who had a great business to erect a private killing-house beyond the two miles' limit, and bring in the carcasses of the slain animals for sale, and thereby avoid either penalty or dues. But this would give him an advantage over the burgh butchers, and to the injury of the Commissioners. There is not even any limit of county or kingdom, and no exception in favour of foreign meat. The parties are agreed that persons bringing in meat for sale from Crieff, Coupar-Angus, Pitlochrie, and Aberdeen have been charged and have paid the dues now sought to be imposed on American meat.

"The defender pleads that, according to the words introductory to the second part of the 363rd section, there must be a clear case of 'evasion of the use of such slaughter-house.' But the fact is that by this traffic there is not only an intentional but a positive evasion of payment of the dues. The defender pleads that the clause cannot apply to his traffic, because the slaughtering being presumably in a transatlantic public shambles, for which dues may have been paid, and adding the cost of the shipment and land transport, which has all to be borne by the seller, he must suffer much more than the burghal butchers. It is clear that the traffic must be profitable, else it would not be carried on; and so far as it is so, then the Commissioners lose so much revenue. The appeal case of the Magistrates of Glasgow (Gellay, 1783, 2 Paton's Reports, 615) tests how a very plausible evasion of an Act was dealt with in the Court of last resort.

"The Sheriff has gone over the great case between a railway and the burgh of Linlithgow. It had many phases, and was twice in the House of Lords. That case finally was decided against the burgh. But there it was not for dues on articles brought within the burgh, but on articles carried through its limits. Much, however, in the opinions of the judges show how jealous the Courts are against any infringement of customary exactions. In that case dues were only founded on ancient Royal charters, but here they are founded on a modern Act of Parliament.

"The Sheriff regrets that in a case so important and so delicate he has not the power, as in cases under the Summary Procedure Act, to state a case for the Supreme Court. As the traffic is likely to become extensive, and affects all towns where there exist public shambles, it may be worth while to have a case submitted to the Court of Session, and none will feel more pleasure in learning that the Sheriff has been wrong in his interpretation of the Act of Parliament than himself. Decree, but without costs."

Act.—MacLeish.——Alt.—M'Cash.

THE

JOURNAL OF JURISPRUDENCE.

THE TWO TRUSTEE CASES, 1865 AND 1874: A SUMMARY OF THE JUDICIAL POSITIONS.

It is all over and done now; and the plea will never again be raised, that a trustee on the register of an unlimited joint-stock company is not liable personally and to an unlimited extent. But while the interest is concentrating itself solely on the consequences of this decision, in the Courts, the Banks, and the Legislature, let us take one last look behind. Is it possible to put into a page or two what each Judge has said, from the beginning of the Western Bank action to the close of the City of Glasgow Bank petition? It is only worth while to try to do it, upon condition of omitting (what of course was in one view the most important part of the reasoning) their detailed answers to the questions, of construction or of probability, which were admitted to be open, and were dealt with as jury, questions. We shall jot down therefore only the position which each Judge took up, or rather the question which each set himself to answer. And in doing so we shall have respect to a question to which the recent letters of Sir George Bowyer, and other English lawyers who are free from the prejudices of English law, have given prominence—what weight is due to the quasi-corporate character ascribed to a Scottish trust. If validity had been conceded to this plea, it would perhaps have been necessary to hold that no individual trustee was a partner or a shareholder; and that either the trust estate or the whole body of trustees must be held to occupy the place of partner, a place which of course they could only fill under certain disabilities and restrictions. It will be found that this view has not been ignored in the statements of opinion. But the way in which in both cases it was taken up by the Court, and indeed in which it was presented to it, was, that the trustees were no doubt partners of the Bank, and the only question to

decide was whether they were partners with a limited liability. We shall take the opinions simply in the order of delivery.

LUMSDEN *v.* BUCHANAN.

(*a.*) *In the Court of Session.*

LORD KINLOCH, as Ordinary, pointed out that the present question was *inter socios* and not with creditors. But he stated the general question as being whether "by the terms of the contract by which the defenders became partners, their liability was personal and unlimited, or was that of trustees merely," and based his answer on the view that "there is nothing in the nature of a contract of copartnery exclusive of the idea of a trustee or a trust estate being admitted into the partnership simply." There is at the most a presumption easily overcome, and in this case he held that it was overcome. The judgment found that the defenders "became partners," but with liability of "trustees only."

THE LORD JUSTICE-CLERK INGLIS could not concur in this judgment—first, in respect of the terms of the deed subscribed; and secondly, on account of the legal character of the adventure entered into. The deed only provides for two parties—(1) companies incorporated or unincorporated, whose representatives may sign binding "their constituents;" (2) individuals, who bind "their heirs, executors, and successors." Finding that the defenders signed in the latter way, he held, on this ground alone, that they not only "became partners," but with personal liability. But secondly, if they are partners, as conceded by the defenders and the Lord Ordinary, the nature of a joint-stock company makes it almost "legally impossible" that they should be under a different kind or degree of liability from other partners. The directors had no right to consent even to an express stipulation to that effect, and there is no such stipulation in the contract. There is, besides, no general rule in law that persons signing a deed "as trustees" limit their liability.

LORD COWAN founds his proposal to reverse rather on the fact that the defenders were "shareholders," and as such he holds they must be "contributories." By section 19 of the Winding Up Act no other is a shareholder but the party "whose name is entered in the register of shareholders." Trustees may in some contracts be exempted by stipulation from personal liability, but their becoming shareholders of a joint-stock company is the strongest case for the other rule being given effect to.

LORD BENHOLME gives a short opinion that the question is one purely *inter socios* and as to the intention of the parties contracting; and he held that the defenders came in, and were accepted as partners, as trustees only.

LORDS NEAVES and MACKENZIE found their agreement with the reversal proposed by the Lord Justice-Clerk on the plea that

trading contracts, above all others, infer unlimited liability. But they also put it on the fact of partnership. "It is even said that, properly speaking, the trustees were not partners of the copartnery, but that the trust estate was the true partner. We do not understand what is meant by the proposition so maintained. The partners of a copartnery must be persons. They may either be individuals, or corporations, including companies considered as persons. But the law does not recognise a trust estate as a person, and cannot consider it a partner."

LORD KINLOCH adds to his former position as Lord Ordinary that "generally speaking, limitation of liability, contained in a contract of copartnery, will be of no effect against creditors, but in regard to copartners will have the full effect which the contract stipulates."

LORD JERVISWOODE, looking at the question purely as *inter socios*, held that the copartnership was entered into by the defenders solely as trustees.

LORD BARCAPLE reasons that by the law of Scotland trustees may enter into contracts with liability limited to the estate; and that though there is a presumption against this in partnerships and in joint-stock companies especially, it was a presumption that was here overcome. "Another form of the argument" on the other side was that "copartnery can only be entered into by persons, and a trust is not a person." But every contract can be "entered into" only by persons, as this has been by the defenders. The question is as to its terms, and who are the *subjects* of the contract as to profit and loss. The subject may be a fund, or estate, or fictitious person, *e.g.* corporations; and this case is substantially the same. "The liability is equally restricted in both cases to the corporate or trust estate; there is equal power to bind that property, and the corporation and the trustees have the same facilities for suing and being sued. The corporators are no more individually partners than the trustees."

THE LORD PRESIDENT M'NEILL, throwing aside the question of liability to creditors, was not prepared to accept the inference that, assuming there was no power to receive shareholders with limited liability, these defenders must be held to have been received with unlimited liability. They had offered to buy only in the former character. But he held also that the contract did not prevent their being received in that former character, with limited liability; and that they were so received.

LORD CURRIEHILL regarded the question with creditors as a momentous but a separate one. In this case the liquidators represented partners who had paid the creditors. The defenders were parties who had not paid; and who were no doubt liable, and personally liable, under their obligation. But the question was, how far did their personal liability extend? His opinion was that a trustee in Scotland binding himself as trustee ordinarily under-

takes personal liability only to the extent of the trust funds; and that this ruled the present case.

LORD DEAS says the first and leading question is, whether a joint-stock or trading company can receive trustees on the footing of not being liable, *inter socios*, beyond the value of the estate? This, he thinks, has not been denied by any of the Judges, and could not be successfully denied. But if so, the whole law of Scotland goes to show that these were presumably "received into the partnership" on the footing expressed in their subscription, *i.e.* *qua* trustees, and as binding only the trust estate.

LORD ARDMILLAN held it to be proved in point of fact that the defenders entered into the contract of copartnery in their fiduciary character, and held that in point of law it is quite possible for a trustee to become a partner in a company as trustee only and without personal liability to his copartners.

(*b.*) *In the House of Lords.*

THE LORD CHANCELLOR WESTBURY stated that in the course of the discussion the defenders had come boldly to deny that they were under unlimited liability, even to creditors. It was "obvious" that the position thus claimed was contrary to the partnership contract: it implied two classes of partners. "It was not in the power of the directors to enter into any such contract, or to admit any persons as shareholders in the company upon any such terms." Such a contract could only be made with all the shareholders personally, of which there is neither proof nor allegation.

LORD CRANWORTH admitted that in Scotland a trust had something of a corporate character, which in England it had not; but held limited or unlimited responsibility in the former country to be an open question, to be solved in each case by the nature of the transaction. In this case the nature of the transaction, being with a joint-stock company, inferred unlimited responsibility.

LORD KINGSDOWN, on the ground of the difference between the English and Scottish law, was much inclined to think that the judgment complained of was right. But looking to the terms of the deed by the trustees binding themselves and their respective heirs and successors, he was willing to concur in reversal.

PETITION—MUIR AND OTHERS.

(*a.*) *In the Court of Session.*

THE LORD PRESIDENT INGLIS held the law settled in the previous case to be that partners of a joint-stock company cannot escape full liability because they hold the stock in trust for others. The petitioners here are entered in the stock ledger of the City of Glasgow Bank as holders of the stock of the Company, but "as trust-disponees." They are therefore fully liable, unless they can found on legislation subsequent to *Lumsden* v. *Buchanan*, or on a

different contract of partnership, or on special conditions of accession; in all of which they have failed.

LORD DEAS said that in a contract of partnership for trading purposes, notice of trust was held by the House of Lords not to prevent personal liability on the part of the trustees, or to limit their responsibility to the trust estate. In many important trusts it may still be otherwise; but the present trading case is the same as that of 1865.

LORD MURE pointed out that, in addition, the House of Lords judgment led to holding that directors had no power to accept a qualified transfer. The case of *Lumsden* v. *Peddie* ("as *curator bonis*") showed that the application of the law was fixed in 1866.

LORD SHAND put as the leading ground of judgment in the previous case that "from the nature and ordinary incidents of a partnership for trading purposes—including banking as one of these —it must be inferred that persons entering into such a partnership undertake individual liability, unless the contrary be expressly stipulated." The present case was the same in all material respects.

(*b*.) *In the House of Lords.*

THE LORD CHANCELLOR CAIRNS said that the scheme of the City of Glasgow deed was clear—"the Bank was to consist of partners, and these partners were to be either individuals or corporations," with no limit of liability in either case. If trustees could limit their liability to the trust estate, the shares might be held by sham trustees. But the directors had no power to enter into a contract limiting it, and such a contract if attempted would be null and void. If then there is an ambiguity alleged as to a contract actually entered into, that construction must be preferred which will give a valid and legitimate obligation—in this case the obligation of a contract of unlimited liability.

LORD HATHERLEY said these banks were just large partnerships, and every partnership involves a certain equality of participation in profit and loss. "It does not depend upon who are the holders of the shares. The shares themselves are the things that regulate the responsibility and profit of the owner of the shares. Whoever at any given time finds his name attached to the ownership of a given number of shares" is liable.

LORD PENZANCE said the appellants on the face of the deed became shareholders in the Bank, but therein also announced that they did it as trustees. But such mere notice of a trust, even if known to parties outside, does not free a trader from personal liability, unless accompanied by peculiar circumstances. And in the present case the circumstances were the other way. "Such a thing as a share in this association with a limited liability in the holder of it did not exist."

LORD O'HAGAN said that in the former case, as in this, one class

of shareholders only was admissible, with equal privileges and equal liabilities. They were pressed to consider Scottish trusts as clothed with something of a corporate character, "and undoubtedly if a Scottish trust constituted a trustee, or a number of trustees, a corporation, that would have relieved the individuals composing it from liability in their several persons, and imposed it on the body." But there was no authority for such a position.

LORD SELBORNE pointed out that by the deed every partner is to be unlimitedly liable. "It is consistent with this that a plurality of persons may be (as is contemplated by the 13th and 14th clauses) co-proprietors of the same shares." The aliquot part of the common burden thrown on that share is the same in both cases. Whether the proprietors become partners for themselves or for the benefit of others, is not a question for the company. Corporations may no doubt hold like individuals, with unlimited liability; but they (like quasi-corporations) are public bodies created by the law. Private individuals cannot limit their responsibility by creating private trusts.

LORD BLACKBURN said, "I think this much at least must be considered as decided and settled, viz. that trustees (not created by a statute) are not by the law of Scotland a body corporate, or, as it has been loosely said, a quasi-corporation." They may limit their obligation to the trust estate, provided that is clearly stipulated, and the other party, being *sui juris*, accepts the limitation. But mere notice of trust is not enough in a contract of partnership.

LORD GORDON merely concurred in the judgment.

It is plain that this is a question in which there has been singularly little progress of judicial argument. It has from the first eddied round and round the same general considerations.

A. T. I.

A STATUTORY DEAD-LOCK.

DAVIDSON *v.* M'LEOD, 1877.—High Court of Justiciary.
HOYLE *v.* HITCHMAN, 1879.—Court of Queen's Bench.

IT is not perhaps often, in these days of centralization and of the assimilation of our law with the law of England, that under newly enacted statutes grave variances are to be found. But it is very unfortunate for Scottish lawyers and their profession (may we venture also to say for Scotland as a nation?) when in these distinctions and differences as to the interpretation of some new Act of Parliament we are found on the side opposed to the greatest of the senses—common sense—supporting a narrow technical view, rendering valuable legislation worse than useless, and enabling the legal

faculty as well as the general public on the other side of the Tweed to point at us the finger of scorn. Sad as the confession may be, to this, in our humble opinion, have we been brought by the judgment of the Judges in the Court of Justiciary, sitting as a whole Court, in the case of *Davidson* v. *M'Leod* (5 R. Justiciary Cases, 1, Dec. 14, 1877), when that decision is contrasted with the *dicta* of Justices Mellor and Lush in the Queen's Bench, in the case of *Hoyle* v. *Hitchman* (March 28, 1879).

The Sale of Food and Drugs Act, 1875 (38 and 39 Vict. c. 63), enacts that (section 63) "no person shall sell, to the prejudice of the purchaser, any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding £20; provided that an offence shall not be deemed to be committed under this section in the following cases: (1) Where any matter or ingredient not injurious to the health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof. . . . (4) When the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation." The Scottish case arose from the sale of cream, and that in England out of the mixing of milk with water. A Glasgow milk-dealer was convicted under the Act of selling to the sanitary inspector of food sixpence-worth of cream which, when so sold, was not of the "nature, substance, and quality" demanded by the purchaser. The purchase was made with funds supplied by the sanitary department, and the so-called cream contained only about 11 per cent. of fat, whereas some of the scientific witnesses said 25 per cent. should be the minimum. In the Sheriff Court the judgment proceeded upon the fact that the article was not truly, as a whole, of the "nature, substance, and quality" of what is known as "cream;" and secondly, that the purchase having been made under section 13 of the Act, there was no necessity for showing pecuniary prejudice on the part of the purchaser, provided only the article sold was disconform to the statutory requirements. The 13th section of the Act empowers a public officer in the capacity of medical officer of health, inspector of nuisances, or of weights and measures, or of markets, or any constable under the orders of the local authority, to "procure any sample of food or drugs, and if he suspect the same to have been sold to him contrary to any provision of this Act, shall submit the same to be analyzed," etc. We may here observe in passing that the section evidently contemplates a purchase of the sample, from the use of the words "sold to him."

Now upon the case as stated for the decision of the Appellate Court by the Sheriff there are really but two points: *first*, Whether the facts warranted the conviction; and *secondly*, Whether the law,

as laid down regarding the necessity for the purchaser's showing that the sale was to his prejudice, was good. As to the first point, of course a question was raised whether truly this was a finding of facts, when, practically, a standard was set up (either by the law laid down or by the opinion of the Glasgow city analyst, it did not much signify which) fixing the minimum percentage of fatty matter in cream, or, in other words, when a decree had been pronounced saying that where milk contained so much fat it was "cream," but if less than that amount it was only milk, and to sell it as "cream" was to render the seller liable to prosecution. As the Lord Justice-Clerk put it in his judgment, the real question came to be, "whether it be enough to constitute the statutory offence that the article sold was not of the quality demanded?" And Lord Young, as well as his Lordship, came to be of the opinion that as the words of the act say "nature, substance, *and* quality," it is essential that the offence shall be a transgression in all those respects, and not merely in one of them. It was however also pointed out that this view was merely one as to the legal meaning of the words in the Act, and had nothing to do with the conclusions arrived at in point of fact, viz. that there was not enough fatty matter in the article submitted to analysis to bring it up to the commercial standard of cream. The opinions expressed upon this portion of the case were so decided that we hesitate to express any doubts as to the probability that the judgment will stand, but it is difficult to feel quite assured, with one of the Judges, that the Act does not contemplate the punishment even of a wine merchant who knowingly (for that, be it observed, is an essential element in the success of the prosecution) sells wine as of a certain vintage or age when it is not so. To endeavour to impose upon a purchaser with 1863 claret, and induce him to take it as 1864, would, we confess, not differ much from what the Act seems to contemplate as an offence, even although there would be no admixture of a foreign substance. This part of the case, however, is not the most important for our purpose at present, for it was in regard to another piece of interpretation that the majority of the Court pronounced a decision now so completely disallowed in England.

This second portion of the case turned upon the necessity on the part of the purchaser for showing that he had suffered "pecuniary prejudice," as the Sheriff put it. Now, though we have come to agree with the result reached by the inferior Judge, whose conviction was supported by the minority, consisting of two Judges in the High Court of Justiciary, and has now on its side the expressed views of two English Judges also, yet we must point out that the insertion of the adjective "pecuniary" is due to the Sheriff himself, and that there is not a word in the Act justifying any such deduction as that the element of money-loss necessarily enters into the question. Let us in a few words state what is the nature of the provisions contained in the 3rd, 4th, and 5th sections of this Act, in order to explain more

clearly the views entertained by those members of the High Court who took up a position hostile to the prosecutor's success. Section 3 prohibits the mixing of any article of food with an ingredient so as to "render the article injurious to health," with the intention of selling the same. Section 4 makes a similar provision as regards drugs. Section 5 gives an exemption where there is proof that the seller did not know of the adulteration, and this exemption on the ground of want of knowledge forms a very important item in considering the true meaning of the statute on both the points raised under section 6. In giving his decision upon the part of the case which, his Lordship remarked, was attended "with less difficulty," the Lord Justice-Clerk said that "the provisions of the 13th and 17th sections are not so drawn as to be applicable, and never were intended to be applied, to any prosecution under the 6th. It is impossible to read these sections, and the intermediate sections, without seeing that they were intended originally, and are only fitted now, to regulate prosecutions under the 3rd and 4th sections, that is to say, prosecutions for mixing or having for sale articles of food containing foreign substances injurious to health. The sample referred to in the 13th section is a sample of that which has been so mixed or exposed for sale, and the prosecution contemplated is not on account of the sale to the public officer under the 6th section, but for the mixing and keeping of the adulterated article under the 3rd and 4th. That no prosecution can possibly lie for selling the sample to the inspector is made too clear to admit of question by the terms of the 17th section, which compels the dealer to sell the sample and inflicts a penalty on him if he refuses." As to this latter question, the sale in the Glasgow case was evidently not a compulsory one, the 18th section evidently contemplates that such sales *may* be voluntary, and further, even if it were always compulsory, there does not seem from that fact to be any certain deduction that the prosecution would not be competent. It may be fairly urged that the law, in default of better means for obtaining evidence of a fraud generally practised in the most insidious manner, has provided this power of compulsion for the very purpose of enabling the public officers to supply the defective proof. There is nothing of hardship in such a view, for to have the purity of goods exposed for sale impugned by such a demand on the part of the inspector, and then triumphantly vindicated by the analyst, partakes much more of the nature of a laudatory advertisement than of any injury. The inquiry is quite private in its nature, but the result may, at what practically is the option of the seller, be turned to good account if satisfactory.

No doubt Lord Young expressed, when giving his opinion, a dislike, which probably is shared in by all upright men, to any traps set for thieves, or devices to ensnare those who defraud, and further added that he did not feel disposed to "sanction artificial additions" to the list of such proceedings as have been by law approved, but

that truly is not facing the difficulty. Is this an "artificial" addition requiring the "sanction" of the Court? Is it not rather a statutory provision which the Court are called on to enforce? We conceive that the Act is certainly at least open to the construction contended for by the public prosecutor, and that the clauses empowering the Local Authority in any place by means of its officials to take action, were meant to supply with certainty those very links in a chain of evidence which, by their absence, must render all official prosecutions under this Act for practical purposes unavailing. There is no supposition or artifice contrary to truth required in order to obtain convictions under the 6th section, through the medium even of compulsory purchases. The sole artifice is on the side of the seller, at whose door lies not only the fraud but the necessity for such legislation as may be efficient to counteract it.

Then, again, looking to the first remark of Lord Moncreiff, that the reference was to deleterious substances such as are mentioned in sections 3 and 4, there is nothing whatever to limit the application of the enactment, as Mr. Justice Mellor observed, to this class of articles, whereas, on the other hand, the provisions contained in sections 13, 14, 15, 16, and 17 empower officials to make purchases for the very purpose of analysis, and, if need be, of prosecution, assuming that the statutory offence will have been committed if the result of the analysis shows that the article has been adulterated. Perhaps the meaning of the clause was most clearly put by Lord Young, who, although he agreed with the majority, said, "What the clause prohibits is in plain speech the passing off on a purchaser, to his prejudice, of an article of food or a drug of another nature, substance, and quality than he demanded and reasonably expected." It is further added, "that such a proceeding is deceitful in the sense that the purchaser's just expectation is thereby disappointed to his prejudice, is, I should think, too plain to be disputed. So much for the meaning of the clause."

Let us turn then to the facts in the English case, and we find that there milk had been sold to the inspector, who had demanded half-a-pint and paid for it. On analysis it was proved to contain one-fourth part of water, and the magistrate held that it was not of the nature, substance, and quality of the article asked for. In this respect of course the first point in the Scottish case was not raised, for the question did not, as between milk and cream, turn on a dispute in the matter of richness or "quality" only, but on the introduction of water, a substance entirely differing from the original fluid, milk. Not only, however, did the police judge in England find that the article was statutorily disconform to what was asked for, but he also came to the conclusion that the purchaser had no knowledge or notion of its being otherwise than what he asked for, so that if the purchase had been effected by an ordinary customer there had been an offence committed

in the sense of the Act. This was even stronger than the Glasgow case, for there no finding of want of knowledge by the purchaser is reported, and some of the Judges seem to have in their opinions given weight to the consideration that the inspector in not getting what he asked for, yet got what he expected, namely, an article not up to the commercial standard of cream. Thus it was observed that at common law a man "who courts deception with the intention that it shall, or even the expectation that it will, be practised upon him, is without remedy in a court of justice, for on the maxim '*volenti non fit injuria*' he is precluded from alleging injury."

Reverting to the English judgment in the police court, the magistrate dismissed the case on the ground that nothing showed the purchaser to have been prejudiced, nor did he profess in any way personally to have been so. The milk was not consumed as an article of diet, but on the contrary was used for the purposes of the prosecution in being subjected to analysis. Further, the price of the milk was not paid by the inspector out of his own pocket, but from moneys supplied to him by the Local Authority, or ultimately by the ratepayers. In the Court of Queen's Bench the authority of *Davidson* v. *M'Leod* was cited as completely in point, and also several other cases in England were referred to, these decisions having been also quoted before the High Court of Justiciary.

Among the English authorities an unreported case was mentioned which had come before the Court of Queen's Bench in 1878, and had reference to the alleged adulteration of mustard. On that occasion also the purchase was by an officer of the Local Authority, and the question came up by way of appeal not merely upon the simple point whether or not there had been "prejudice" to the purchaser, but also on a defence set up by the appellants that it was very well known that mustard was mixed with flour and other things, so that the purchase could not be to the "prejudice of the purchaser;" and though on the former point one of the Judges (Mr. Justice Lush) expressed an opinion that it was not material that the sale was to an officer, and said that in his view if the article were adulterated, it must be presumed to have been to the prejudice of the purchaser; on the second point, which equally involved the meaning of the words in question, the Court sent the case down to be restated; and as it was impossible to deny that it *was commonly known* that mustard was mixed and adulterated, the case never came up again before the Court, and the view taken by the Court was probably fatal to the prosecution. Again this question was before the Court of Queen's Bench on both these points in a case of *Sandys* v. *Small* (June 26, 1878), heard before the Lord Chief-Justice and Mr. Justice Mellor. It was a sale (to an inspector) of whisky alleged to have been mixed with water, and the defence set up was that it was known to be so mixed, and so was not a sale "to the prejudice of the purchaser," and the Court so held; and as they were against

the prosecution on that point it was not necessary to decide the other, though the two points were shown to be closely connected in the course of the arguments, for it was pointed out that in most cases purchases for the purposes of prosecution were by public officers, who only made such purchases in cases where they had reason to believe and did believe that the articles sold were adulterated and were commonly adulterated, and that in such cases the officers did not purchase for consumption, and probably did not consume any part of what they purchased. The Lord Chief-Justice was alleged to have said (and no doubt did say) in answer to that argument, "If the officer does not consume the article, how is he prejudiced?" it being admitted that in such cases the officers do not pay the price out of their own pockets; and, as we have mentioned, the decision having in point of fact been, that the prosecution failed because the purchaser was not "prejudiced." From this remark or inquiry by the Lord Chief-Justice an impression was produced on the minds of the magistracy in England, that their own Courts, as well as those in the sister country, had held it to be essential that any sale in the sense of this Adulteration Act must be "to the prejudice of the purchaser" personally, and that if he neither paid for nor consumed the articles purchased, it could not be said that he was "prejudiced."

These two decisions of course were mentioned only in the case of *Hoyle* v. *Hitchman*, having been in point of date posterior to the Glasgow case; but there were also two English judgments cited in the High Court, to which a brief reference may not be amiss. These authorities were *Pashlar* v. *Stevenitt* (May 27, 1876, 35 L. T. N. S. 862) and *Webb* v. *Knight* (June 13, 1877, 46 L. J. Mag. Cases, 264). Water had been mixed with gin, and, as Lord Craighill said, that might have rendered the cases distinguishable from the Glasgow one, as water is a foreign element, but it was assumed in both *Webb* and *Pashlar* that some water was always present in gin sold to the public. The question came to be one of degree, as the same Judge put it. It is further to be remarked that in both *Webb* and *Pashlar* the purchaser was a public officer; in both there was a conviction; and in both, on appeal, that conviction was sustained.

It was pointed out strongly by the minority in the Glasgow case —(1) That, as already mentioned, the sale was not compulsory; (2) that though got as a sample, the cream was sold and paid for. The article obtained was what was asked. (3) That it was no answer to the Act to say that the alleged purchaser got the very thing he demanded, and so could not have been prejudiced. It would be strange indeed, as Mr. Justice Mellor expressed it, if all the careful provisions of the Act "were to be made nugatory by a construction which would, in effect, come to this—that proceedings could only be taken by private individuals. Here (in *Hoyle* v. *Hitchman*) the purchase was made by the inspector under those sections; but surely

the case must be treated as though the purchase had been by a private individual. Now, in the case of a private individual no one could dispute that in such a case as this the offence would have been completed, and the magistrate has so found in fact. That being so, what difference can it make as to the nature of the offence that the purchase was by an officer on behalf of the public and furnished with public money for the purpose? If the purchaser asks for a certain article and gets an article which by reason of some admixture of a foreign article is not of the nature or quality of the article he asks for, he is necessarily 'prejudiced;' and how can the fact that the purchase is not with his own money at all affect the question of the commission of the offence? The offence intended to be prevented by the Act was the fraudulent sale of articles adulterated by the admixture of foreign substances which would necessarily be 'to the prejudice of the purchaser;' and those words were inserted only to require that such an adulteration should be shown to have been made. Taking all these matters into consideration, I cannot bring my mind to the conclusion that in such a case as this the offence is less complete merely because the money with which the purchase was made was not the money of the purchaser, which must be wholly immaterial to the seller and cannot affect the offence he has committed. I come, therefore, to the conclusion that the magistrate was wrong in dismissing the case on that ground, and therefore that the case must be remitted to him to be determined on the evidence as to the offence alleged to have been committed."

If this judgment be correctly reported, the Judge, by his use of the disjunctive "or" as between "nature" and "quality," implies that his view of the interpretation of that part of the Act might also differ from that of the Justiciary Court. But we only refer to that in passing. The true point of the decision to our mind is, that it is quite immaterial to the seller, and therefore to the commission of the offence, whether the money used in the purchase was the purchaser's own or another's. If he delivered an inferior article, it is an inference that he did so to the prejudice of the recipient. "Suppose," say the minority in our Court, "the purchase had been made by a private purchaser under section 14 of the Act" (this section contains provisions as to dealing with the sample when purchased), "would a complaint on his part have been ousted on the ground that he had not been prejudiced? To find this, or indeed to give effect to any of the contentions which have been mentioned by the appellants, would, in my opinion, be virtually a repeal of the 6th section." Is it likely that taking an interpretation such as this, we are following the intention of the Legislature. It were different if from such a course the result was a violation of any of the well-recognised canons for governing the interpretation of an Act of Parliament, but that, we venture to think, is not so here. "I am quite aware," said the Lord Justice-Clerk, "that the views which I

have taken on this matter may make the future operation of the 6th section of the Act very difficult; but its provisions are so very obscure that I think nothing but legislative interference will remove the anomalies it presents." Again, Lord Deas said, "The safer and sounder construction of this penal enactment is to hold that the prejudice it contemplates is of a personal matter." This is in reality interpolating "personal" into the words of the Act, and may be objected to with as great force as the similar proposition by the Sheriff-Substitute who made it "pecuniary prejudice."

It appears to be necessary, in order to arrive at the result of quashing a conviction upon these grounds, that some not expressed word or other must be read between the lines of the Act, and we confess to a preference for the English mode as well as for the English result. We are unable to see with one of the Justiciary Judges, that the result attained here would be anything but excellent were convictions to follow in all such cases, nor can we understand what there is in a contrary judgment, such as Justices Mellor and Lush pronounced, to lead to the conclusion that "a purchaser who is really injured by having a quantity of spurious goods passed upon him as genuine, and who is in a condition to prove it as clearly as facts ever are proved in courts of justice, must be told that the Act has not been violated, and that he has no title to sue under it in respect the transaction was a real one, and really to his prejudice. This would no doubt surprise him, and his wonder might even be increased if his legal adviser proceeded to tell him that if he wanted to have a case under the Act he must make one or have one made for him, and that the way to proceed was to return to the shop and pretend that he wanted a little more of the same article, *just sufficient for analysis*, on getting which he must explain himself, and offer to divide his sample with the shopman, and immediately resort to the public analyst with the rest; that when this was done he would have a case under the Act or not, according as the analysis showed that the shopman had fallen into the trap or not." What we are not able to see is how the position of the private purchaser would in any way be altered by the English view of this section. The words italicized in the sentence above quoted do not appear in the Act, nor are they necessarily implied by any one of its provisions that we have been able to discover.

We cannot better conclude our observations on the judicial contradictions to be found in the two cases which form the text of this article than by quoting one sentence from the joint opinion delivered in the Glasgow case by the Judges in the minority on that occasion:—

"There is, so far as we can see, no distinction between the case of a purchase by a private individual and that of a purchase by one of the public officers specified in section 13. If the one has a title to complain of an alleged contravention, so may both. If the one may suffer prejudice when the article purchased is for analysis, so may both."

STATUTE LAW REVISION ACTS.

We would again direct public attention to this anomalous legislative machine. We refer to our articles in our volumes for 1864 (p. 484), 1876 (p. 39), and the current volume, January number (p. 40). These repealing and reviving Acts come on us by surprise and without notice. Some device could surely be had whereby the drafts of these shifting statutes might be submitted to public notice previous to their becoming law. They ought at least to have the imprimatur of the Lord Advocate for Scotland in dealing with Scottish law, of which, with respect, it appears that the Commissioners are one and all profoundly ignorant.

The last of the series of statutes affords a melancholy instance of the rash and haphazard working of this cumbrous machine. It has appended two schedules. The first schedule contains "*Enactments repealed*," and consists of about 100 statutes repealed in whole or in part! These repealing clauses reach back to the 6th of Queen Anne, and touch on the Treaty of Union of the kingdoms. The second schedule enumerates statutes which in whole or in part had been repealed by the Commissioners by the Revision Statutes 1873 and 1875. The Commissioners, discovering their error, now revive the slain laws, and once more breathe the breath of life into their corpses. The first schedule, however, repeals the statutes in whole or in part, "but subject to the exceptions and qualifications in the said schedule annexed." Not only these reservations, but there are no less than seven saving clauses annexed! The first two saving clauses are perfect marvels of complexity, and only a Solomon or a Solon could trace out the hidden meaning. The first clause runs thus: "Provided that where any enactment *not* comprised in the said schedule has been repealed, confirmed, revived, or perpetuated by *any* enactment hereby repealed, such repeal, confirmation, revision, or perpetuation shall *not* be affected by the repeal effected by this Act." Many legal minds have been directed to this puzzle, and have in desperation given the solution up as insoluble! It seems to mean that what has *not* been repealed, notwithstanding it has been *repealed*, is nevertheless *not repealed!* The second provision is of the same cabalistic character as the first: "The repeal by this Act of *any* enactment shall not affect *any* Act in which such enactment has been applied, incorporated, or referred to." The guess here appears to be that the repeal by *this* Act is not to affect the Act repealed if the enactment has been incorporated in *any* other Act. The clause of revival is also strangely worded: "The enactments described in the second schedule to this Act, which were repealed by the Statute Law Revision Acts 1873 and 1875 respectively, are hereby revived as from the respective dates of the repeals thereof; and all proceedings taken under the said enactments respectively, since the dates of the respective repeals thereof, shall be as valid and effectual as if the said enactments

respectively had *not* been repealed"! There is something approaching to the miraculous in holding that an enactment which had never been repealed can be said to be revived, and that too at and from the very date of its non-existence, and that all proceedings from the date of the repeal are held to be as if the statute had not been repealed. But if an act was done, it is not easy to perceive how it can by any wand of a legal harlequin or rod of a magician be undone.

We will select some of the legislative legerdemain of the Commission, and confine ourselves to the Public-House Statutes (Scotland). These statutes have been the especial favourites of the Commission in slaying and restoring to life. By the repeal Statute 1873, the 25th and 26th sections of the Act 9 Geo. IV. c. 58, were repealed. The 25th section regulated appeals to Quarter-Sessions; and the 26th section excluded review by superior courts. These clauses being thus erroneously repealed, there was no appeal to Quarter-Sessions, but one to the Supreme Court. Nevertheless, in the interval, appeals were often taken to Quarter-Sessions. The Commissioners restored or revived the 25th section in their Act 1875, declaring all Acts in the interval to be as valid and effectual as if the said section had not been repealed. But apparently the 26th section, excluding the review of the Supreme Courts, remains repealed by the Act 1873.

The Revision Statute 1873 repealed the first four sections of the Act 9 Geo. IV. c. 58. These sections repeal the old Licensing Acts, and regulate the granting of licences both in counties and burghs. The subsequent Act, 25 and 26 Vict. c. 35, superseded these sections, and fixed different days for holding the Licensing Courts. The Statute 1878 leaves the 1st section under its repeal, restores the 2nd section, and partially restores section 3 and 4. It is very difficult to discover the meaning of this unnecessary legislation. The subsequent statutes had been operated on without any difficulty, but now it is impossible to say which statute rules.

By the 18th section of the 9 Geo. IV. c. 58, no licence could be granted by the Excise without a previous certificate by the justices. But by certain Excise statutes table-beer licences could be so granted. Dr. Cameron's Act, 39 and 40 Vict. c. 26, sec. 17, abolished this privilege. The Commissioners repealed the 18th section of 9 Geo. IV. by their Act of 1873; but very unnecessarily they have restored it once more by the Statute 1878, thereby making a conflict between the Act of Geo. IV. and the 39 and 40 of Victoria, and again it is not easy to determine which is the rule.

The 23rd section of 9 Geo. IV. c. 58, providing for the forms of procedure, was superseded by the Act 25 and 26 Vict., but nevertheless was unnecessarily repealed by the Revision Statute 1873, and partially restored by the Statute 1878. This will be found by justices and officials to cause much doubt and diversity as to the proper forms to be adopted.

We could proceed to detail other minor clauses in the Public-

House Statutes, wholly or partially repealed one year, and wholly or partially revived in subsequent years, which must greatly puzzle officials. One especial difficulty is whether one or two applications and relative certificates are now necessary for spirituous liquors and for malt liquors. But there are at least two points of most serious magnitude which will require immediate legislation to settle on some safe and clear principle.

A rather difficult point has been raised as to the definition of burgh, and the limit of the powers of county and burgh magistrates to grant licences within the burgh territory. Under the 9 Geo. IV. c. 58, secs. 3 and 4, the burgh is expressly defined to mean *the Royalty*. In the defining clause of the Act 25 and 26 Vict. c. 35, the term burgh is extended to the *Police boundaries*. Accordingly Lords Ardmillan and Neaves, in an appeal at Glasgow Circuit, held that the limits were the *Parliamentary* boundaries, though outside of the burgh lines (27th April 1867, *Booth* v. *Laing*, 39 Jurist, 388; 5 Irvine, 371). By the Revision Statute 1873 the first four sections of the Act 9 Geo. IV. c. 58, were repealed, but unfortunately by the Revising Statute 1878 these sections are once more restored, so far as again to make the *Royalty* the boundary line of the *burgh*. Thus a most material and perplexing conflict has been raised between the county and burgh magistrates, which the Commissioners must forthwith by special statute allay.

Perhaps one of the most serious repeals in the Statute 1878 is that of the interpretation of terms in the Act 16 and 17 Vict. c. 67, whereby it was set forth " the expression inn and hotel in certificate No. 1, shall refer to a house *containing at least four sleeping apartments set apart for the accommodation of travellers*." There is nothing in subsequent legislation to modify this very judicious enactment. No doubt by the 8th section of the Act 25 and 26 Vict. c. 35, there is provision made for a report by a justice or magistrate that the premises, whether hotel or public-house, are of suitable construction and accommodation for the purpose applied for. But this by no means supersedes the express statutory amount of accommodation for an inn or hotel licence. The reporting magistrate hitherto has required at least four beds as the necessary qualification to receive an inn licence. When it is recollected that an inn licence gives the person holding it liberty to keep open house on Sabbath for *bona-fide* travellers, it will be seen how necessary it is that there be a respectable house with sufficient accommodation for the travelling population. It was often matter of regret that the limit of beds was much too small. It will thus, with the repeal of the prudent clause defining a hotel, enable one justice to report favourably for an inn licence in any remote part of the country, though there be no suitable accommodation for travellers, and indeed without even one bed. Inns and hotels may thus become so many drinking-saloons to be kept open all the days of the week.

H. B.

NOTES IN THE INNER HOUSE.

ALTHOUGH, of course, much of the time of the Court has recently been devoted to the numerous and melancholy cases arising out of the failure of the City of Glasgow Bank, yet, apart from this branch of law, not a few important decisions have been pronounced since the commencement of this session. To several of these attention has been already directed in our pages, and we now propose to bring down to date, so far as possible, notes on those cases likely to prove of general, or at least of extended interest.

It may be perhaps convenient in the first place to notice one or two ecclesiastical cases which have been decided recently, and we may begin with *Cassie and Others* v. *The General Assembly*, etc. (165 L. R. 167), though in point of date it is subsequent to the Paisley Abbey case, to which we shall make reference hereafter.

Towards the end of November judgment was given in this action arising out of a vacancy in the parochial charge at New Deer in Aberdeenshire. The minister died in December 1875, and on the last day of the six months following the congregation appointed a successor, who, four months later, withdrew his acceptance, and the question then turned upon which of two bodies were entitled to the patronage, whether the Presbytery of the bounds *jure devoluto* were to exercise the right, or whether the congregation still had a right to elect their minister. There was a further question raised as to the title of certain persons to be placed upon the roll of the congregation who had not communicated, and thus acquired right until after the roll had been made up for the election. This latter point was decided against the claimants by the General Assembly of the Church, to which ecclesiastical Court appeal had been made. On the first question, that of the exercise of patronage by the Presbytery *jure devoluto*, the Assembly decided against their own inferior Court, and granted a period of six months of new, from the date of the notification by the appointee that he declined the charge, in order to allow the congregation an opportunity of appointing. The action in the Court took the shape of a reduction of the judgments of all the Church Courts, with declaratory conclusions as to the right of the persons claiming to take a part in the election of a minister. The persons who made the claim asserted that they did so by virtue of a statutory right, and that consequently they were entitled to appeal to the Court for the vindication of that right. The Act (37 and 38 Vict. c. 82, Church Patronage (Scotland) Act, 1874) gave the Church Courts power "to decide finally and conclusively upon the appointment, admission, and settlement of a minister;" but it was maintained that this jurisdiction, though in one sense final and not open to review, was nevertheless rendered useless in cases where the Church Courts exceeded the limits of the statute, and that in refusing to place these names on the roll

the Assembly had violated the Act. On the other hand, it was contended for the decision of the General Assembly that it fell within the regulations laid down by that body as prescribed by statute, and was in no sense *ultra vires*. This latter view prevailed, against, however, the judgment of the Lord Ordinary (Young); and the Lord Justice-Clerk in giving his opinion pointed out that "very grave reasons of expediency may manifestly exist for not permitting, during a heated contest, any additions to be made" to the roll, pending discussion in the Church Courts. He thought, and so did Lord Ormidale, that the matter of fixing the time when the roll should be made up was clearly within the regulating power of the Church Courts, and by them it had been regulated.

Although earlier in date than the case of *Cassie*, we have taken second in order the judgment in *Stewart* v. *The Presbytery of Paisley* (16 S. L. R. 105), which is chiefly valuable for the remarks from the Bench as to the working of the Church Patronage Act, 1874. The facts of the case were very simple. The first charge of the Abbey Church became vacant on 19th October 1877, and a new minister was elected in March 1878; he, however, declined to accept the call. The congregation appointed a committee, who reported on April 15th that they could not get the three candidates to allow their names to be submitted to a meeting of the congregation. A motion to proceed to the election was rejected, and one to delay was carried. The committee were then reappointed to confer and co-operate with the Presbytery. On the 19th April the period of six months from the vacancy elapsed, and the Presbytery thereafter resolved to refer the whole matter to the General Assembly, by whom it was discussed and decided that in the sense of the seventh section of the Act (37 and 38 Vict. c. 82) no appointment had been made, and that consequently the right of patronage had accrued *tanquam jure devoluto* to the Presbytery. Now there were here two points raised, the first as to jurisdiction, the second as to the merits of the case. It is obvious that if the jurisdiction and the finality of the judgment of the Assembly were sustained, the question on the merits could never really emerge, but that otherwise the merits of the case came to have full significance. Two members of the congregation applied for interdict against the Presbytery appointing to the benefice by virtue of the finding of the General Assembly. They pointed to the third section of the Act as conferring the right on the congregation, and refused to concede the claim of exclusive jurisdiction of the Church Court urged on behalf of the Presbytery. In the opinion of the Court, delivered by the Lord President, among many important observations the following may be quoted: "The right to try the qualifications of persons appointed to vacant parishes, to decide finally on the sufficiency of their qualifications, and to admit or reject them accordingly, has always belonged to the Church from the year 1592 to the present day, and that irrespective of the nature of the Church government

prevailing for the time, whether Presbyterian or Episcopal. But the right to decide finally and conclusively on the 'appointment, admission, and settlement' is conferred for the first time, and must be held to include a final decision on all questions as to the exercise of their right by the congregation in each particular case, and on all questions as to the time, place, and manner in which the admission and settlement of the minister is to be carried to a conclusion. Further than this, the statute does not seem to have conferred any new or exclusive jurisdiction on the Courts of the Church." The learned judge pointed out further that the question here turned upon rights secured as well as created by statute, and that the enforcement or challenge of such could only be effected by means of the Supreme Civil Court, unless *per expressum* conferred on another Court; and his Lordship added that an enactment conferring on Church Courts "power to adjudicate in a competition of statutory rights would have been so entire a novelty that it would have required very clear words in such a case to oust the ordinary tribunals." The facts of the case were, however, in favour of the Presbytery, and for them, therefore, on the merits the judgment went, it being obvious that the position of two members of a congregation in seeking to revive a right several months after the statutory six months had expired was untenable.

The third ecclesiastical case we shall notice is that of the *Reformed Presbyterian Church* v. *The Ferguson Bequest Fund and Others* (January 7, 1879, 16 S. L. R. 300). The Reformed Presbyterian Church at the time of Mr. Ferguson's death was one of five denominational bodies in Scotland which were benefited by the trust created by him for the "maintenance and promotion of religious ordinances and education and missionary operations." Some years later, however, a split took place, and the minority withdrew from the majority, who had abandoned, it was said, the principles of their Church. Later, again, the majority joined the Free Church. The minority had all along been deprived of the benefits of the bequest, and they now sought not merely to share in these benefits, but to have it declared that they alone were the real and original Reformed Presbyterians, and as such entitled to exclude all others claiming in that capacity. The Court gave effect, not to this contention, but to what appeared to have been the intention of the truster, namely, the inclusion of all those bodies who held generally certain theological tenets accompanied by a certain form of worship. In this view both majority and minority were entitled to share in the benefits of the bequest. The expressions of opinion as to the interference of the Courts in theological questions are very interesting when we compare them with the observations we have just quoted in the Paisley case; for they show clearly that while under very exceptional and absolutely necessary circumstances the Court might inquire into the doctrines and rules of any ecclesiastical body, they will always if possible

avoid doing do. Wherever the interpretation of a statute is in question the Supreme Court will exercise its jurisdiction unless expressly prohibited from doing so; but where religious matters are involved it will avoid entering upon the province of the Church Courts, unless it be to prevent glaring injustice or to protect individual rights. So where questions of property are raised as to buildings held on titles permanently associating them with a Church which has broken up into sections, the Courts will adjudge between parties as to their rights in the property even to the extent of inquiring into theological rights and wrongs. "The subject in dispute," the Lord President said, "is matter of civil and patrimonial right, and the Court cannot decide that question of right without reading and interpreting the contract which imposes on the members adherence to particular doctrines, laws, or usages as conditions of membership of the Association." Another example was given of what might occur where a legacy had been left to a church.

These three Church cases have taken up more of our space than at first was intended; but we must before leaving them to notice other decisions generalize in a few lines on the results they have attained. The two earlier cases are by far the more important as interpreting a new statute, and they show that the Court has no desire to take cognizance of detail in the working out of the Patronage Act, nor to interfere in such matters, for example, as the making up of the Communion roll, the regulations as to adherents, or even the appointment of a minister from the presbytery always to be *ex officio* chairman of the congregational meetings during a vacancy, but that they will interpose to prevent the extension by the Church Courts of their powers or the arrogation to themselves of new rights, and they will review and closely inquire into all matters of this kind. Lastly, adhering to the same principles, the Court will avoid if possible all doctrinal questions, and only act where the legal rights of persons subject to its jurisdiction are involved. It would be well were other Courts created for other purposes to let law alone, and leave it to the lawyers as carefully and anxiously as the Civil Courts leave alone all matters outside of law.

One or two poor law cases have been decided since November last by the Court. In *Dempster* v. *Lemon* (16 S. L. R. 194) the principles applied in the leading case of *Beattie* v. *Arbuckle* were enforced. The whole question turned upon an alleged admission of liability made seven years before, and the parish which had made the admission was held bound to relieve. "The admission, if made for a certain amount of liability, was an admission for all, provided there had been no change of circumstances." The fact that the matter had been dropped for so long a time was held no bar to the effectual character of the admission. A different point in the same branch of our law was raised by the case of *Roger* v.

Morison (16 S. L. R. 210), where, in deciding a question of settlement, the Court held in accordance with *Cruickshank* v. *Greig* (January 1877), that a pauper whose house was situated and whose family resided in a different parish from that in which he worked, had nevertheless acquired a residential settlement in the parish of his house, although he had never continuously resided therein long enough to acquire a settlement. It was observed that in the present case the general rule was applicable, and that a man resides in the sense of the Poor Law Act in that place where he maintains a house, where his family live, and whither he returns whenever his avocations permit. In the case of *Jackson* v. *Ireland* (16 S. L. R. 325), decided on 29th January 1879, the Court gave effect to the contention that the settlement of a pauper's husband, acquired both by birth and residence, inured to his widow, though the husband had not resided in the parish for one year out of the three last years of his life. Lord Young, in giving judgment, referred to the cited authority of *Allan* v. *Higgins* (3 Macph. 309), and said that, *mutatis mutandis*, that judgment, which would then read thus, might suffice to settle the question: "That the husband who acquires is the party to whose presence the law will look during his life, in the event of retaining the settlement, and on his death the widow who inherits his settlement, if she remains resident, would be held to carry on the presence begun by her husband."

The powers of statutory trustees to employ trust funds in payment of expenses incurred in opposing certain bills in Parliament were called in question by way of suspension and interdict in *Wakefield* v. *Commissioners of Supply of Renfrewshire* (16 S. L. R. 183). The Court refused to allow the Commissioners to pay out of county assessments the expenses incurred in opposing a road and bridges bill for Scotland with a view to getting Renfrewshire exempted from its operation. The bill did not pass, and there was no doubt the Commissioners had acted *bona fide* in the belief that the bill would be injurious to the interests of the county; still it was held that their action was *ultra vires*, and that the proper course would have been to petition Parliament instead of laying out corporate funds in a mode different from that to which by statute they were destined.

In several other cases private trusts formed the subject of litigation. Thus in the special case, *Mackay's Trustees* (December 3), the ultimate beneficiaries and the annuitant were allowed to come to an arrangement by which the estate, which had vested *a morte testatoris*, could be at once divided, due security being provided for payment of the annuity. The principle recognised in *Kippen* v. *Kippen's Trustees* (10 Macph. 134) was thus more fully developed. So again in *Watson and Others* (Munro's Trustees, December 13) it was held, not without a dissentient voice however, that where one-third share of the whole estate, including the portion liferented, was bequeathed to the truster's wife, who was also liferented in

the house and furniture, the value of the liferent-interest formed a proper deduction from the trust estate in calculating the shares to which each of the beneficiaries were entitled. The special case of *Paterson and Another* (Macfarlane's Trustees, 16 S. L. R. 198) turned really upon a question of probabilities. Whether was it more likely that the truster should have mistaken the sex of his brother's child, or the name of his brother? The Court thought the former mistake more probable, and gave the bequest to an only daughter of the testator's brother James in preference to the only son of another brother David, the actual words being in favour of "my late brother James's son." The question reminds us of an unreported case, *Ferguson* v. *Ferguson*, a year or two ago, where the names of two nephews were confused by the truster in his will.

A somewhat nice question as to widows' provisions under an entail arose in a petition argued and decided on 10th December 1878, *Christie* petitioner (16 S. L. R. 204). A lease of a quarry was current at the date of the death of the last heir of entail in 1868, and in computing the provisions of his widow under bonds granted by him the rental was estimated as inclusive of this mineral rent. Subsequently, however, the lessee of the quarry, taking advantage of a break in his lease, put an end to his contract, and accordingly, the quarry continuing unlet, no rent was received for it by the heir in possession. In these circumstances he sought to have the widow's provision reduced by the amount of one-third of the rent of the quarry, which had been computed in estimating the amount to which she was entitled. The Court, however, refused to give effect to this view, and held that there was "such a degree of permanence" in this portion of the rent as to bring it within the Aberdeen Act (5 Geo. IV. c. 87, s. 1). The date of the death of the last heir is the time indicated for making the calculation of the sum payable, and the Court would not ten years afterwards enter upon any inquiry when, for that period, the amount had been regularly paid. We cannot but regard the decision as a hardship on the petitioner, although undoubtedly in terms of the statute. The judgment, however, was expressly pronounced upon the special circumstances of the case, and it may be hoped would not be extended in application, for it is evident that positive injustice might be done in times of depressed trade were every heir of entail empowered to bond his mineral as well as his land rents under all circumstances for provisions to a widow. A further question under an entail was raised in *M'Donald* v. *M'Donald* (January 16, 1879, 16 S. L. R. 271), where the value of an expectancy fell to be estimated. The Court refused to take into consideration in such a case the chances of the heirs-substitute succeeding to the fee simple of the estate. There was also a dispute as to the right to inquire into the goodness or badness of the life of the next heir, which was decided in favour of such inquiry and of a computation based upon its results.

A trustee in bankruptcy has it entirely in his own discretion under the Bankruptcy Act whether the examination of a bankrupt shall or shall not take place in private; and further, it is no good ground either for adjournment or enforced privacy of the examination that a third party (a partner of the bankrupt) appears, and by his procurator asserts that the answers given may tend to incriminate him when lying in prison on a charge of theft and fraud (*Wright* v. *Guild*, December 7, 1878, 16 S. L. R. 203). Again, at the public examination of a bankrupt, a question (the object of which was to ascertain whether a certain sum of money had come into the bankrupt's hands, and what had become of it), being in itself competent, may be put by the agent of any creditor without judicial sanction under section 93 of the 1856 Act, after the trustee in bankruptcy has concluded his portion of the examination (*Barr* v. *Tosh*, February 8, 1879, 16 S. L. R. 329).

Under the Companies Act, 1862, sec. 85, a nice point was raised in *Syme* v. *Benhar Coal Co.*, where the company and its provisional liquidator sought to have a debenture holder restrained under the Act from obtaining a decree for payment of the amount of his bond. The application was refused, it being pointed out that the creditor merely wished to have his claim put upon such a footing as would secure a power of execution, and, moreover, that the company or liquidator were not prepared to give any undertaking to find security for damages. In the case of the *Lochgelly Coal and Iron Company* v. *The Lumphinnans Iron Company* (January 15, 1879) the latter were interdicted from using the term "Lochgelly Coal" as applicable to their own coal, it being practically held that the property in this trade-name was equivalent to a trade-mark. This decision may, it is said, have somewhat curious results in mining and colliery districts, for the real and original signification of the term "Lochgelly Coal" was that the particular seam known by that name was first worked at that colliery; so that in point of fact, at Cowdenbeath, for instance, this Lochgelly coal is quite well known and recognised as coal of a certain seam, not meaning coal raised at Lochgelly pits. The result will be that the raisers of coal from this seam will in future have to specify the name of their own colliery, adding the other name as that of the seam, whether "Lochgelly," or "Dunfermline," or any other.

The case of *Lamont* v. *Rankin's Trustees* (February 26, 1879, S. L. R. current number) raised the point whether for the purposes of a feu-duty and payment of casualty trustees were "singular successors" or not under the Act of 1874. The trustees maintained that they were not so, but were merely interposed between the truster and the beneficiary, who was also his heir-at-law, in order to pay off burdens and convey the estate. The Court by a majority decided against the trustees, Lord Young dissenting in a very powerful and closely reasoned judgment.

Another decision of some moment, also yet unreported, was given

in *Henderson* v. *Lloyds Register*, where an unsuccessful attempt was made by the owners of a steamer to obtain damages from Lloyds Association for having deprived their vessel, one of the American ocean liners, of her class in consequence of non-compliance with a regulation of Lloyds as to load line, which had been laid down subsequent to the original classification and survey of the steamer. The Court refused to acknowledge any contract, direct or implied, by which Lloyds were bound to retain the vessel in her class provided she complied with the older regulations.

The case of *Gibson* v. *Milroy*, on 20th March 1879 (not yet reported), called forth some important remarks from the Lord Justice-Clerk as to the rights of foot passengers in a road, and the necessity on the part of drivers of vehicles for using lights. As to the first his Lordship indicated a strong opinion that the foot passenger was entitled to walk in the middle or any part of the road, there being no obligation on him to keep on the path at the side, though in this instance there was no regularly constructed footpath. As to the matter of lights, without laying down any absolute decision that on country roads lights must be carried, there was a distinct intimation that presumptions otherwise must tell against the driver where any accident occurred. It was not a matter of positive obligation, but of proper precaution. In all such questions, however, both the fact of the injury itself and the right to claim damages must necessarily depend largely upon special circumstances.

In a question of paternity the case of *Reids* v. *Mill* (Feb. 8, 1879, 16 S. L. R. 338) was a very remarkable one. A married woman and her husband sued another man for aliment for a child born in wedlock, but only three months after the marriage. It was shown that great intimacy had existed between the wife and the defender prior to her marriage, as also between her and her husband, though this was denied by the pursuers. The wife also pretended that till the date of the marriage her husband did not know that she was pregnant. The action failed, but there was an observation by the Lord Justice-Clerk to the effect that where a birth takes place before the full time after marriage the maxim *pater est quem nuptiæ demonstrant* may be rebutted by evidence, this evidence being, however, almost conclusively met by proof of great intimacy between the spouses before the marriage.

Lastly, we may notice that an argument was maintained successfully in *Dundas* v. *Waddell* (16 S. L. R. 340), that in order to establish immunity of lands from teinds there must be evidence from the titles of these requisites: (1) Direct connection with a Churchman prior to 1587. (2) A grant *cum decimis inclusis*, but not that only, for also the words *et nunquam antea separatis* were necessary. (3) Confirmation of the grant either by the Pope or the Crown. (4) Continuous connection of the reddendo for the lands and for the teinds.

Correspondence.

FIXITY OF TENURE.

SIR,—I quite appreciate and subscribe to most of the objections so often made at present to the existing laws of hypothec and entail. Both, I have no doubt, will before long be abolished; and I sincerely hope that some further advance, beyond the point which we have yet reached in this country, will be made, in getting rid of the senselessly cumbrous and expensive method of transferring land. That the thing is possible is proved by the fact that it is done, not only in many Continental countries, but in our own Colonies.

But none of these changes, in my opinion, will effect any very great or marked improvement either in the position of tenants or in the productivity of land. It is the want of permanency of tenure, I feel persuaded, far more than anything else, that turns both skill and capital away from agriculture, and that is not only ruining but degrading and demoralizing so many Scottish farmers.

A terminable lease, whether long or short, is essentially a bad tenure to begin with; and it has further the very grave fault that it gets worse and worse the longer it lasts. Every year that passes takes from its value, diminishes the interest of the tenant in the subject, and renders him less and less willing to expend his capital, his skill, and his affections upon it. Ceasing to cherish it as a home, or even to care for it as a residence, his whole interest in it soon comes to consist in the profit he can take out of it, or the loss he can escape in consequence of retaining it, during the remaining years of his lease. And this is the very opposite of the landlord's interest. Landlord and tenant are thus, as some one has said, in the same boat, but they are pulling in opposite directions; and it is no wonder that the bad relation which both parties honestly deplore should subsist between them. They may be good friends, and no doubt often are, in spite of this relation; but the whole effect of the lease is to set them by the ears; and we know how often they get quarrelling about game, and trespass, and roads, and drains, and fences, and fixtures, and anything and everything that may turn up. I do not believe that any enactment about payment by the landlord for permanent improvements by the tenant, even if it amounted to Tenant-Right in the fullest sense ascribed to it in Ireland, would cure this evil. The tenant would not expend on the subject whilst it belonged to a landlord, who might eject him if he chose at the end of his lease, a shilling beyond what he felt sure he would recover; and the landlord would not expend what he felt was to be for the profit of a tenant whose rent he could not raise till the lease expired. Above all, the practice of farmers

renting land beyond what their capital enables them to cultivate with profit would continue; and farming would not become an occupation in which men of capital or culture would willingly engage. The valuation of permanent improvements, and still more of improvements partially exhausted, is, moreover, always a very difficult matter, and both parties are rarely satisfied with the award.

Is it possible then to get rid of these evils?

To a certain extent proprietors may themselves become farmers; and this I am glad to see is taking place in Fife, and, I believe, in other districts. But this arrangement can never be carried out, with profit, by the proprietors of great estates; and its adoption would lead to evils of a kind of which we have had as yet no experience in Scotland. Great proprietors could farm only indirectly, through stewards and superintendents; and as they could not possibly look into the proceedings of such men with any degree of minuteness, the system of making them interested in the amount of the returns which they procured from the land would inevitably grow up. We should thus have the tenant system back in a far worse form, that, viz., of Middlemen.

That the object cannot be attained by the tenants themselves becoming the purchasers of their farms, even if the landlords were willing to sell them, is still more obvious, because this would involve their investing in the purchase of the land the capital which, as farmers, they require for its cultivation. That a man with considerable capital might frequently do better by purchasing a small farm with one-half of his fortune, and improving and cultivating it very carefully with the other, than by renting a large farm which he can only partially look after, and risking his whole means in its cultivation, is a view which I hold pretty strongly. But to such men the market is open; and if they do not avail themselves of it, it is their own fault. That they do not do so more frequently arises, I daresay, from the fact that the farms which they might desire to purchase are those which they occupy, and to which they are accustomed, and that these farms are not in the market. For this difficulty there is no remedy which would not involve far greater evils than it would cure; and I certainly would be very far from advocating any legislative enactment which, under any pretence whatever, should enforce sales.

If we are to have permanent holdings, we must seek them in free and open market, and there are but two ways, as it seems to me, in which this is possible.

If the system of personal government, of which we hear so much in foreign affairs, were to take the form of paternal government in domestic matters, the State might buy up the whole of the land which came into the market, divide it into such holdings as seemed most likely to be advantageous to the com-

munity, not only with a view to productivity, but for maintaining a healthy and happy rural population, and then let it out on permanent leases. These leases might be made redeemable by their holders; and from the amount of capital which would thus be drawn into the agricultural interest, the public revenue might be benefited, both directly and immediately by the higher rents which would be obtained, and indirectly and permanently by the increase which would be made to the general wealth of the country. But this would involve an amount of State interference, which is un-English, and I think unnecessary; and a complicated system of management by Government officials, which it would be exceedingly expensive and difficult to carry out.

The second expedient—and that which presents itself to my mind as involving the smallest number of objections—is, that the purchase of estates, as they come into the market, should be made, not by Government but by joint-stock companies with limited liability, formed for that purpose, and corresponding in some measure to the companies by which houses are built or purchased in towns, and gradually transferred to their occupants. In the case of the farms, I do not think it would be necessary, or perhaps desirable, to contemplate an ultimate purchase by the tenant in any other sense than as a possibility, for which provision should be made, and which might act as an incentive to greater industry and frugality. But his lease ought to be for ever—" whilst grass grows up, and water runs down." Even a 999 years' lease I would positively exclude, on the principle that as "time slips verra fast awa" it would not be a 999 years' lease for a single hour after it began. To legalize such leases an Act of Parliament would probably be requisite, which would resolve itself into a slight modification of the Act 20 and 21 Vict. c. 26 (10th August 1857); and I would introduce into it a clause empowering heirs of entail in possession, with the consent of the next heir, to grant such leases, without the necessity of disentailing their estates.

Under a lease of this kind the tenant's inducement to expend money, skill, industry, and affection on his holding would be quite as great as if it were his absolute property. He would simply hold it as a feuar—indeed as most of us hold our houses in town—with this difference, that the rent which he paid would be the full annual value of the subject, if let to another. Like a feuar, too, I propose that he should have free power of sale without consent of the proprietor, at all times, in open market. The property itself, as in the case of a feu, would continue, of course, to be the guarantee to the dominant proprietor, whether an individual or a company of the kind I have suggested, for the rent.

You will ask me, perhaps, whether I expect such companies to be formed from motives of pure philanthropy; and, if not, where I expect that the profits are to come from which shall induce shareholders and lenders to invest in them. I reply,

that the source to which I look for profit is the higher rents than those now paid for nineteen years' leases, which I believe would be paid, and paid far more steadily because paid by wealthier and better tenants, for permanent leases. Only men of some substance, of course, could avail themselves of an arrangement which would yield no profit in the first instance. But it is increased productivity alone which can yield ultimate profit, and it is to the influx of capital, industry, and skill that we can look for increased production. I feel persuaded that any proprietor who chose to let a farm on the conditions I have described, would not only obtain a higher rent, but would find that his security for its payment was increased by the fact that his land had become more productive. It is sentiment alone which need prevent this from being done with all lands which are held as mere investments; but as it is a sentiment which I myself share, I cannot hope for its disappearance in the case of others. A company of the kind which I propose, however, would be free from all such individual frailties. As the security moreover would be absolute, both shareholders and bondholders would, I believe, be contented with very moderate returns. In Holland, where great works of drainage and the like are carried out by such companies, I was told that 3 per cent. was considered a very fair return; and as heritable bonds in this country yield only 4 or 4½ per cent., I believe that such companies would, at the present moment, have no difficulty in getting large sums of money from trust estates on easy terms.

The most convenient arrangement I think would be that one such company should be formed in each county town, so that something like a local character might attach to them, and that their office-bearers might possess local knowledge.

Should this scheme commend itself to you or to your readers, many valuable suggestions for carrying it out in detail will be found in the interesting series of "Reports from her Majesty's Representatives respecting the Tenure of Land in the several Countries of Europe, presented to Parliament in 1870-71," as also from the publications of the Cobden Club—the volume entitled "Systems of Land Tenure in various Countries," edited by J. W. Probyn in particular, and from a pamphlet just published by Mr. Shaw-Lefevre on "The Working of the Bright Clauses of the Irish Land Act." Though I have not found in any of these that a scheme analogous to what I have suggested has been proposed, the manifest tendency everywhere is in the direction of substituting proprietorship for tenancy in the person of the actual cultivator of the soil. But this object, in Continental countries, is generally sought by means of legislative enactment, and this I am desirous of avoiding whenever it is possible. *In corruptissimâ republicâ plurimæ leges* is a saying which we ought never to forget. Legislation with a view to converting terminable into permanent holdings, under whatever guise it may present itself, is an interference

with the rights of private property which can be justified only if these rights, from the lapse of time or otherwise, have become merely nominal, or if, from the mode of their exercise, they have been converted into wrongs. Nor would legislation, within the bounds of honesty, help us over the main difficulty of the problem, even if we regard it from the tenant's point of view. That difficulty, as I have already said, arises from the fact that, as permanent leases must involve high rents, very small profits, if any, could be hoped for by the tenant during the first years of his lease. It is from increased production alone that an increase of profit which is not merely apparent can arise either to tenant or landlord; and it is on the assumption that such an increase of production would result from the advantages afforded by permanent tenures as would render the arrangement ultimately profitable to both, that the whole scheme depends. Is this assumption warranted?—Yours faithfully,

J. LORIMER.

1 BRUNTSFIELD CRESCENT, *April* 14.

Reviews.

Manual of the Law of Insolvency and Bankruptcy. By JAMES MURDOCH, Member of the Faculty of Procurators in Glasgow. Fourth edition. Edinburgh: William Blackwood & Sons.

IT is a melancholy fact that perhaps no branch of the law is at the present moment attracting greater attention than that which relates to bankruptcy. By publishing at this time, therefore, a fourth and enlarged edition of his valuable manual, Mr. Murdoch has done good service to the profession. Some sixteen years have elapsed since the third edition appeared, and during that period not only have many important decisions been given, there has been also further legislation, *e.g.* the Companies Amendment Act of 1867, the Joint-Stock Companies Arrangement Act of 1870, the Bankruptcy Amendment Act of 1875, and the provisions relating to *Cessios* contained in the Sheriff Court Act of 1876. In addition to the notes issued by the Accountant in Bankruptcy, the present volume contains over one hundred forms used in bankruptcy proceedings of much practical use. The system followed in former editions appears to be adhered to in the present. The decisions are for the most part referred to by date only, their import being stated very briefly, but in such a way as to indicate clearly their bearing upon the point in question.

A Hand-Book of the Law of Scotland. By JAMES LORIMER, Advocate, Professor of Public Law in the University of Edinburgh. Fourth edition. By RUSSELL BELL, Advocate. Edinburgh: T. & T. Clark. 1879.

IT is hardly necessary at this time of day to say anything about Professor Lorimer's well-known handbook. The fact of another edition having been called for within a few years is ample proof, if proof were needed, of the value which the profession attach to the work. The additions by the last editor are now incorporated in the text, and the new matter alone is marked by brackets. Mr. Russell Bell has proved himself a worthy successor of the former editors, and the additional information he has given bears marks of discriminating care, and the references to cases are brought down to date. All this makes the volume considerably bulkier than it was on its previous appearances, and has necessitated the re-numbering of the paragraphs. Its size however is still extremely convenient, and there are few legal works which contain so much accurate information in so small a space. The only mistake that we have noticed is in sec. 2039, where the Act 60 Geo. IV. c. 120, sec. 50, is printed for 13 and 14 Vict. cap. 36, sec. 50. The printing and general "get-up" of the book leave nothing to be desired, and an excellent index renders the contents easily accessible.

Statutory Forms for Parliamentary Elections in Scotland, with Practical Directions for their use. By WILLIAM HECTOR, Sheriff-Clerk of Renfrew. Paisley: Alexander Gardner. 1878.

THIS is simply a collection of statutory forms under the Ballot Act, together with a few practical directions. By obtaining this book officials may become familiar with such forms, to their great advantage during elections. The collection has been submitted to and approved by the Sheriffs of Renfrew and Bute, and of Fife. A copy of the Ballot Act is annexed. We trust that this little volume will have a wide circulation.

NOTE.

The author of the "Handbook of Procedure and Redress at Law," which we reviewed in our last number, has drawn our attention to the fact, that whereas we threw some doubt on his statement, that "where parties are not agreed upon the facts of a case—upon giving in only summons and defences—one juror may try the issue, and his decision is final," it is to be found in the 50th section of the Court of Session Act, 1850, which enacts that "if the parties in any cause before the Court of Session in which an issue is to be tried shall consent to refer the same to any one arbiter, or to any three, five, or seven arbiters, it shall be lawful for the Court or the Lord Ordinary, and the Court or Lord Ordinary is hereby required to allow such arbiter or arbiters to be sworn and to sit as a jury to try such issue; and such arbiter or arbiters, or the major part of their number, in the event of difference of opinion, shall have all the

powers of a unanimous jury. The proceedings of such trial shall be conducted, as far as may be, as in any ordinary case of trial by jury, either party being entitled to take exceptions, and to move for new trial, as in any ordinary case: Provided always, that it shall not be competent to either party to object to the verdict, or to move for new trial, in respect of the verdict being against evidence, or on any other ground implying miscarriage on the part of the jury alone: Provided also, that the Court, in the event of granting a new trial, shall direct the new trial to proceed before the same arbiter or arbiters, if able to try the cause, and the new trial shall in that case proceed before the same arbiter or arbiters accordingly." We regret the error into which we were led, but we can vouch for the fact that such a provision is totally unknown to the great majority of practising lawyers at the present day. We have to thank Mr. Spink, however, for directing our attention to this curious piece of forgotten and abortive legislation.—ED. *J. of J.*

Obituary.

THE RIGHT HON. THOMAS F. KENNEDY of Dunure. By the death of the above-named gentleman the Faculty of Advocates is deprived of its oldest member but one, Mr. Kennedy having been called to the Bar in 1811. We need not here enter into the particulars of the late gentleman's career, as he early forsook the forensic strife of the Parliament House for the more stimulating warfare of Parliamentary debate. In 1818 he was elected member for the Ayr Burghs, and sat for that constituency till 1834. In 1837 he was made Paymaster of the Civil Services in Ireland, and was sworn a member of the Privy Council. He was Commissioner of Woods and Forests from 1850 to 1854. The daily press has given such a full account of the right honourable gentleman's political career that we need no more here than pay a passing tribute to his memory.

WILLIAM AUGUSTUS KEIR, Esq., Advocate (1868), died at Valparaiso on the 15th February.

WILLIAM JOHN SANDS, Esq., W.S. (1845), died at Edinburgh on the 11th April.

The Month.

The Advocates' Library.—We beg to draw our readers' attention to the statement regarding the Advocates' Library which we give below. To preserve this noble library in all its usefulness ought to be a matter of the utmost interest to every educated Scotsman,

and we do not hesitate to say, that should it lose any of the privileges which it at present enjoys, the literary and intellectual life of Scotland will receive a blow which, reacting on the country itself, will have the most disastrous effects. If the threatened changes are carried into effect, we do not think we are speaking too strongly when we say that no piece of legislation since the Union will have done more to destroy the national importance of the country. It is not a matter which merely pertains to the Faculty of Advocates, it is one which concerns every one who takes the slightest interest in literature and literary work; the legal profession especially owe too much to the Advocates' Library, both directly and indirectly, to see it threatened with what amounts to practical extinction, without making every effort to avert such a national calamity.

"STATEMENT BY THE FACULTY OF ADVOCATES

In regard to the recommendation of the Royal Commissioners on Copyright as to repealing the statutes requiring that a copy of every new book be deposited in Public Libraries in the United Kingdom.

"1. The purpose of the following statement is to assign the grounds upon which the Faculty of Advocates resist the recommendation of the Royal Commissioners upon the Copyright Laws,—that the statutes should be repealed under which copies of every book published must be furnished to certain public libraries—one of which being that of the Faculty of Advocates.

"Before reciting the recommendation of the Commissioners, it may conduce to a more clear appreciation of the case were a preliminary statement now made, as to the time when, and the grounds upon which, the obligation to deposit books in the public libraries of the three kingdoms was first imposed.

"2. The first Act of Parliament which recognised copyright was passed in the year 1709—8th Anne, chap. 19. Prior to that statute the authors and publishers of books had no protection—or, at least, no effectual protection—from invasions of their copyrights—if such rights existed. According to the common law of England, as declared by the House of Lords in the case of *Donaldson* v. *Beckett* (4 Burr. 2395), copyright does not exist. It rests entirely on the statute of Anne and subsequent Acts of Parliament. This question has been made the subject of controversy among lawyers; but the result of all the discussion has been to confirm the judgment given effect to in the House of Lords in the above decision. The grounds upon which this judgment rests are stated by Mr. Fitzjames Stephen in the Digest of the Law of Copyright appended to the Commissioners' Report, as follows: 'Copyright at common law ceases upon publication, because the general principle that a man has a property in everything which he produces by intellectual labour, and can treat as an injury any use of it without his leave, would lead to absurd results. It would give a man copyright in his conversation. It would enable an author to prevent any one lending copies of his works to friends. It would make all the works of the human mind private property, vested

quality of the paper, . . . and the substituting delivery on demand . . . to distribution in the first instance,' etc., except in the case of the British Museum, which national establishment ought, in the opinion of the Committee, 'to be furnished with every publication that issues from the press in its most splendid form.'—*Report of Select Committee on Copyright of Printed Books*, session 1813, No. 292.

"8. In the following year the Act 54 George III. cap. 156, was passed. This Act continued the obligation to deliver the books; and so the law stood till the year 1835, when the Act 5 and 6 William IV. cap. 110, became law. This Act took away from six of the public libraries entitled to receive copies of new books, the right to claim them, and in lieu of this right pecuniary compensation was granted, on a computation of the value of the books which each of the libraries had respectively received, on an average of three years prior to the passing of the Act. The several amounts thus yearly receivable and paid at present are as follow:—

"The Library of Edinburgh University . . .	£575
" " Glasgow University . . .	707
" " St. Andrews University . . .	630
" " King's College, Aberdeen . .	320
" " The Queen's Inns, Dublin . .	433
" " Sion College, London . . .	363
	£3028

"These sums were, by the Act of Parliament, directed to be expended by the authorities of the various libraries in the purchase of books. The only library left in Scotland in which every new book might be expected to be found was that of the Faculty of Advocates; and the only library in Ireland that of Trinity College, Dublin. There were three libraries in England which still retained the privilege—viz. the British Museum, the Bodleian Library of Oxford, and the Public Library of Cambridge. It is now proposed to deprive Scotland and Ireland of the privilege which the peoples of these kingdoms enjoy, of having a complete Public Library in their own country, and to appoint that the only library in the United Kingdom where all published books shall be found shall be in London.

"9. The recommendation of the Royal Commissioners, which has called forth the present statement, is in the following terms: 'Having to decide between the authors and publishers on the one hand, and the libraries on the other, we on the whole consider that the complaint of the authors and publishers is well founded, and we have come to the conclusion that so much of the existing law relative to gratuitous presentation of books to libraries, as requires copies of books to be given to libraries other than that of the British Museum, should be repealed. In making this recommendation we have taken into consideration the facts that the bodies to whom the libraries belong are possessed of considerable means, and are well able to purchase any books which they may require; and also that the repeal of the clause giving the privilege will not deprive the libraries of any property already acquired, but merely of a right to obtain property hereinafter to be created.

"'165. It will have been seen that we do not propose to interfere with the obligation to deliver at the Library of the British Museum a copy of every book published, as it is a part of our scheme that registration should

be effected and copyright secured by the deposit of a copy of the work for the public use. To this we think no reasonable objection can be made.

"'166. We will only add that the importance of securing a national collection of every literary work has been recognised in most of the countries where there are copyright laws.'

"10. The Commissioners state that they were influenced in coming to this conclusion by the fact 'that the bodies to whom the libraries belong *are possessed of considerable means, and are well able to purchase any books which they may require.*' In this reason the Commissioners have forgotten entirely the purpose of the deposit of books in the National Public Libraries of the three kingdoms. It is not for the use of the keepers of the libraries that the deposit is made, except, indeed, as being citizens and inhabitants of the kingdoms. What *they* 'require' was a matter not involved in this discussion. It is what the nation of Scotland or Ireland requires. Then as to the statement of the 'considerable means' of the Faculty of Advocates, they regret to state that they are not in this position, as will be explained hereafter. It is to be regretted that inquiry had not been made into this assumed fact, upon which the Commissioners base such an important conclusion. No person representing the Faculty of Advocates, or the Bodleian Library, or the Public Library of Cambridge, or Trinity College, Dublin, was examined by the Commissioners. This may have arisen from misapprehension as to the order of business of the Commission. So far as regards the Faculty of Advocates, they were willing and anxious to have given all information on the subject, both as to their own means and the management of their library. But they waited for a special intimation as to the time when such evidence would be taken, which they never got; and hence they now labour (along with the other three bodies) under the disadvantage of being obliged to state their case after the conclusions of the Commissioners have been arrived at, and their report made.

"11. The Commissioners have given effect to the views on this subject laid before them by London publishers, of which the following, by Mr. William Longman, a representative of the trade, may be taken as putting the case for the booksellers in the strongest light:—

"'484. (*Mr. Jenkins.*) With reference to the incubus of the tax, as you have regarded it, occasioned by the presentation of five copies, do you think that it is an unfair thing, as you are granting a right of property of considerable value in a large number of cases, to take these five books? —I do think that it is an onerous and burdensome tax.

"'485. But supposing that as publisher you were going to publish a book of considerable size, would you not take into the estimate of your expenses the fact that you would have to provide these books to the various libraries?—It would hardly be possible to do so, because, in proportion to the cost of the edition, the additional five copies do not add much to the cost, although they certainly take away a certain amount of the receipts; but the giving up of the delivery of four of those five copies could not have any influence on the price at which a book is sold.

"'486. Then what would be the effect of it?—It would relieve literary men and literary proprietors of an unfair tax.

"'487. But if the tax is of so slight a character that you would not take it into consideration in your estimate of expenditure, can you really call it unfair?—It is a slight tax if you attempt to spread the cost of these five

copies over an edition of 1000 or 1500 copies, but in its total amount it is by no means a small tax; and I know that in many cases where small numbers of a book are published it is felt as an extremely serious tax.'

"The witness then states a case of an expensive work of 150 copies having been published, and complains that it would be a hardship to give away five of these to the public libraries. He was then asked the question, 'Are not those instances really confined to cases in which a man does not care about profits?—They are not to be judged of in relation to the commercial principle. In the case to which I allude, the deriving of profit was by no means a matter of no consequence, and there are but few cases in which it is a matter of no consequence. In every case, although you may take the cases of books at a small price, where it appears to be a very small affair, still, taking the whole thing together, it does amount to a very large sum, and it seems to me that it is a tax on one class for the benefit of the nation. These libraries are supposed to be established for the benefit of the nation, and not of one class only, and beyond that, I am quite sure that it is a very severe burden to many of those public libraries to be obliged to give house-room to every book which is published.'

"It is quite true that those five copies are given '*for the benefit of the nation*,' but they were given only in return for the recognition of a copyright (at the present time) for a term of forty-two years; and the public good, which the deposit subserves, is a matter of as much importance now as it was in the year 1709, when the statutory monopoly was first created.

"12. The only publisher from Scotland who was examined by the Commissioners was Mr. John Blackwood. The London publishers appeared in force. It was natural to expect, that if a copy of every new book were deposited in a London library they would not see any necessity for a similar deposit being made in the libraries of the metropolis of Scotland and of Ireland. What the Irish Public Library authorities have to say on the subject will no doubt be heard in due time; but it is very significant that no Scottish publishers, and no authors of books resident in Scotland, came forward in support of the views of the London bookselling trade. Mr. John Blackwood, the only Scottish publisher examined, was asked no question on the subject. One cannot speak very positively in regard to a matter as to which the Scottish publishers were not examined. But if we may judge of their views upon the subject from the expressed opinion of one of them, there can be little doubt that they would view the carrying out of the recommendations of the Commissioners as a public calamity. In the year 1868 there was a proposal made to increase the usefulness of the Advocates' Library by the extension of its buildings, and the providing better accommodation in its rooms. For this purpose a grant in aid was sought from Government. The matter was taken up with much earnestness by the representative bodies in Scotland—municipal, academical, and ecclesiastical; and in support of the movement Mr. William Chambers, the head of the eminent publishing firm of W. & R. Chambers, Edinburgh, wrote a letter to the Town Council of that city, in which he thus expressed himself, and would no doubt have so expressed himself if he had been examined before the Copyright Commission:—

"'I wish you and the public,' said Mr. Chambers, 'generally to understand that this is no trifling matter to Edinburgh, or to Scotland. Our city has long held a distinguished place in every department of intellectual activity, and there can be no doubt that its scholastic and literary fame forms one of its chief attractions—attractions of which not its citizens alone, but all Scotchmen, are proud. It behoves us, then, as one of our most important trusts, to foster by every means in our power whatever is fitted to maintain the prestige, and if possible to increase the attractions of our old capital; and we may be assured that everything which offers inducement to the scholar, the man of letters, or the student, to settle here, every facility afforded to the scientific investigator, or to the plodding, thoughtful artisan, to prosecute his researches, is a direct tangible advantage, the future results of which, as regards Edinburgh and the country at large, it is impossible to forecast. Apart, however, from such general considerations, it cannot be overlooked that literature, in its relation to printing and publishing, is very closely connected with the material interests of the city. Publishing may be almost termed the "staple trade" of Edinburgh. Until now it has been assisted by the liberality of the Faculty of Advocates, and if that has to be withdrawn a heavy loss will be entailed on the community. I may just say, on behalf of the publishing business with which I am connected, that if the Advocates' Library is shut to public investigation, we shall probably have to remove to London, and an expenditure of about £20,000 per annum amongst a miscellaneous body of persons will be abstracted from Edinburgh. Other publishers like ourselves may have to adopt a similar course.'

"13. With reference to the Library of the Faculty of Advocates, it may here be proper to state certain facts as to its resources and management, in consequence of the reason assigned by the Commissioners for their decision.

"The library is contained in a building immediately adjoining the Parliament House, Edinburgh, extended from time to time by the Faculty of Advocates, partly from their own funds, partly with the assistance of the State, and is now estimated to contain about 260,000 printed volumes, besides a collection of MSS. of great interest and importance. It ranks next to the British Museum and the Bodleian among the libraries of the United Kingdom. It is managed by a keeper, under the superintendence of a board of six curators annually appointed by the Faculty from their own number. The Faculty is an incorporated body, consisting of, at present, 361 members.

"14. The library has from the first been made accessible to all engaged in literary work, not only in Scotland, but within the United Kingdom, and in foreign countries, on a footing, it is believed, in several respects more liberal even than that of the British Museum is. It is, for all practical purposes, the Public Library of Scotland. The way in which it has been managed has thus been very correctly described by Mr. Maitland, M.P. for the Stewartry of Kirkcudbright, Solicitor-General for Scotland, in the evidence which he gave to a Select Committee of the House of Commons on public libraries in the year 1849: 'Though the library is the property of the Advocates, practically it is the property of the public, for there is no library in Great Britain where the access

given to the public generally is more liberal than in the Advocates' Library. Strictly speaking, an order is required to obtain admission to it, but that has fallen into desuetude. Every person of respectable appearance applying for access to books or manuscripts is supplied with them, and is allowed to consult them with such facilities as our limited building affords. It would require some additional buildings to make it thoroughly useful; but to the extent of our accommodation the public are received most liberally. I never heard of a case of an order being required from a stranger. In the case of a person of respectable appearance it would never be thought of.'

"15. Not only has the Legislature, from the time of Queen Anne, secured to the Faculty a copy of every book published in Great Britain, but valuable collections of rare books and MSS. have been gifted or bequeathed to them for their library. They have also, from time to time, got assistance from the State, in money and otherwise, for the extension of their library buildings. Thus, by the 48 Geo. III. c. 146, on the preamble that additional buildings in connection with the Law Courts in Edinburgh were required, *inter alia*, 'in such manner as to give further accommodation to the Library of the Faculty of Advocates, which has always been deposited in those edifices, being of the greatest service to the Courts of Justice, and accordingly encouraged by Parliament,' power was given to the trustees appointed by that Act to provide additional accommodation to the library, which was done out of the funds provided by the statute.

"16. The Faculty have made available to the public not only the books thus obtained, but also their far more precious stores of unique MSS. and rare books, acquired from their own funds or from private sources. In order to the carrying out of this object they have expended upon buildings, etc., their whole corporate funds, except a sum recently received as the price of a portion of their unoccupied ground taken for Sheriff Court accommodation, and they have besides been in the practice of receiving a contribution of £225, 15s. from every entrant admitted to their body (on an average of the last three years, yielding about £1700 *per annum*), specially for the maintenance of the staff, book-binding, and other annual expenses of management of the library. These expenses (on an average of the last three years) have amounted to upwards of £1900; thus causing a deficiency, which had to be provided for out of the other income of the Faculty, now amounting to only about £300, so that there is thus left less than £100 for the ordinary annual expenditure of the Faculty for its other purposes. It will thus be seen how far the statement of the Royal Commissioners—that the Faculty had ample means to buy books—is from the fact.

"17. Some years ago the Faculty set on foot, and have now successfully completed, a printed catalogue of the library in six quarto volumes, on a plan which has attracted the attention of the officials of other great libraries, not only in our own country, but on the Continent and in America. This has hitherto been effected entirely by means of a private subscription among their own members.

"18. It is to a great extent owing to the aid of the Advocates' Library, administered as it has hitherto been, that Scotland has been enabled to contribute writers in every department of literature and science from

without, as well as from within, the Bar, who have had no small share in stimulating the progress of our age, intellectually and socially; and in the works of many of the greatest writers of our country will be found acknowledgments of the obligations they were under to it. As stated by Mr. Chambers in the letter above quoted, Edinburgh is the seat of a great publishing business, and the works that issue from the Edinburgh press are indebted very largely to the stores of the Advocates' Library. The Edinburgh publishers, and the authors whose works they publish, are allowed free access to, and have permission to borrow from, the library all the books they need. Without the ample supply therein contained, the study necessary for the production of the books emanating from the Edinburgh press could not be successfully prosecuted, and thus one of the distinguishing characteristics of the metropolis of Scotland would, were the library deprived of its supply of books, be extinguished. The necessary consequence of this would be the transference to London, if not of the publishing trade, at least of the native Scottish authors, who could not carry on their professional pursuits when deprived of the tools with which they work. Anything that would tend to the dislocation of this publishing business and its affiliated branches of trade, would be fraught with danger to the best interests not of Edinburgh merely, but of the country at large.

"19. It is not easy for the Scottish people to appreciate the fairness of the proposal, that the only great library having a complete collection of published books, to which the Legislature of the three kingdoms afforded assistance, should be in London. Is it not rather the duty, as well as the best policy, of the Legislature to provide reasonable facility for the prosecution of literary and scientific pursuits to the inhabitants of all of the three kingdoms, as far as practicable, on a footing of fair equality? The encouragement of scientific, literary, and artistic institutions both in Edinburgh and in Dublin, has, accordingly, hitherto been dealt with by the House of Commons as matter of Imperial policy, and this is a course of action only in accordance with the spirit of the Treaty of Union, which gives to the people of each country equal privileges.

"20. In almost all the States of Europe, as also in America, the condition is attached to the recognition of copyright, that there shall be deposited in one or more of the public libraries of the State a copy of every new work published. The information on this subject down to the year 1852, and with reference to the state of Europe in that year, will be found in the 'Returns' to the House of Commons relating to Foreign Libraries, obtained through the instrumentality of her Majesty's Ministers abroad, and reported to the House by the Select Committee on Public Libraries.—*Parliamentary Papers* for 1850-51-52.[1] Copies are required to be lodged, according to these returns, in the Public Libraries of France, Belgium, Holland, Turin, Tuscany, Naples, Palermo, Spain, Portugal, Bavaria, Hanover, Hesse Cassel, Hesse Darmstadt, Prussia, Saxony, Switzerland, Sweden, and Denmark. According to

[1] See (1) Report from Select Committee on Public Libraries, ordered by the House of Commons to be printed 1st August 1850; (2) Report from the same Select Committee, ordered to be printed 2nd August 1851; (3) Report from the same Select Committee, ordered to be printed 25th June 1852. Appended to these Reports are the Returns as to Foreign Libraries.

the laws of some of these States there are more copies required to be deposited than in others. In some the public libraries belonging to the State are alone favoured, and in others the universities also obtain the privilege. Thus, for example, the University of Turin claims the right with the Royal Library. In Naples four copies are appointed to be delivered, one of them being to the University Library. In Portugal the Royal Library at Lisbon has one copy, and the Town Library of Oporto another. In Bavaria two copies go to the Royal Library at Munich, and one copy to each of the three Bavarian universities. In Hanover the Royal Library in the capital, and the University Library at Gottingen, each obtain a copy. In Hesse Cassel the Provincial Library at Cassel, and the University Library at Marburg, have each the same right to a copy. In Hesse Darmstadt three copies must be given —one to the Ducal Library at Darmstadt, another to the University Library at Giessen, and the third to the Town Library at Mentz. In the kingdom of Prussia the Royal Library at Berlin obtains a copy of every work published within the kingdom. The University Library, however, of Berlin, is entitled to a copy of every book published within the province of Brandenburg; that of Breslau (since 1825) to a copy of every book published within the provinces of Silesia and Lusatia; and that of Halle to a copy of every book published within the Prussian province of Saxony; whilst the Royal and the University Library of Königsberg possess a similar right within Lithuania and Eastern Prussia; the Library of the University of Bonn within Prussia Proper; the Paulinian Library at Munster within Westphalia.

"By the laws of the United States of America, one copy before publication, and two copies after publication, of every work in which a copyright is secured, must be deposited in the State Department at Washington,—such is the enactment in the Copyright Statute passed by Congress in the year 1870.

"21. In the event, however, of it being thought expedient to give effect to the decision of the Royal Commissioners, it is respectfully submitted that this should only be done, on the footing of giving to the four libraries which are to be deprived of their rights the pecuniary value of these. An equivalent in money would enable them to purchase most of the works they now receive from Stationers' Hall—free them from the obligation of storing the worthless or the trivial, and give the means of purchasing duplicates of the best. For such a course there is the precedent of 1835, with reference to the six libraries then deprived of their statutory privilege, as already explained; and the pecuniary value of the right is stated in the return made by the Faculty to the Commissioners, and printed by them in the Minutes of Evidence.

PATRICK FRASER,
Dean of Faculty."

Glasgow Law Agents and Sheriff Court Arrangements.—We are glad to learn that the Glasgow legal practitioners are exerting themselves in regard to matters of professional etiquette. We hope agents in other parts of the country will follow the good example thus set them, so that the business in the Sheriff Courts may be conducted with more dignity and decorum than is at present sometimes the case. We read in the newspapers that on Friday the

18th April, "a meeting of the Procurators was held in the robing-room, County Buildings, for the purpose of considering certain arrangements in connection with the procedure in the Sheriff Court. Mr. Duncan Macfarlane occupied the chair, and there was a numerous attendance. The subject of the dress worn by the members of the Bar while in Court was first under discussion. It was pointed out that, despite the understanding that the members should wear a black gown and white tie while engaged in Court, it had been to a large extent disregarded. On the motion of Mr. Downie, seconded by Mr. Grieve, it was resolved that the members of the Bar should always appear and plead in the Courts in court costume—black gown and white tie. It was also agreed to request the Sheriff to issue an order that all witnesses while under examination should, except in very special circumstances, stand at some distance from the agents, and that members of the Bar should stand while examining a witness or addressing the Court in the course or at the close of a proof. A member referred to the number of individuals who were occasionally practising and appearing at the Bar who were not licensed practitioners, and thought that something should be done to put a stop to this. Several Procurators spoke of cases which had come to their knowledge in which the doings of these individuals were not at all creditable. Ultimately the committee was instructed to investigate as to the appearance in Court of unlicensed persons conducting legal business, and to report to a future meeting."

Female Lawyers in America.—Woman has scored another victory in the United States. For some time ladies have been engaged in the practice of the law at Washington, but were not allowed the privilege of appearing before the Supreme Court. Congress has now passed a measure relieving them of this disability. It is provided that any woman who shall have been a member of the highest court of any State or Territory, or of the Supreme Court of the district of Columbia, for the period of three years, and shall have maintained a good standing before such Court, and who shall be a person of good moral character, shall, on motion and the production of such record, be admitted to practise before the Supreme Court of the United States. When the bill was passed on the 6th inst. by the Senate, by 40 "ayes" against 20 "noes," all the senators who advocated the bill were presented with bouquets, while three senators who had especially distinguished themselves by their zealous support of the measure were awarded by large baskets of flowers.

Summer Session.—The Court of Session will resume its sittings for the season on Tuesday, 13th May, and will rise for the long vacation on Saturday, the 19th of July.

Appointment.—The Sheriff of Banff, Elgin, and Nairn has appointed Messrs. Soutar and J. Forbes, Solicitors, Assistant Procurators-Fiscal for the county of Banff.

SHERIFF COURT OF PERTHSHIRE.

Sheriffs BARCLAY and LEE.

CRAIG *v.* WILLIAMSON.

Lease—Game—Clause of Arbitration.—This was an action at the instance of Mr. James Craig, Craigdarroch, tenant of the farm of Innergeldie, Comrie, against Col. D. R. Williamson of Lawers. The pursuer asked the Court to find that the defender was bound to enter into a submission along with him for the purpose of having the difference between them as to the injurious increase of rabbits on the farm of Innergeldie settled by two neutral men of skill, and to nominate said men, and also to have it determined to what extent the rabbits are to be kept down in future. It was averred for the pursuer that he entered into a lease with the defender at Whitsunday 1874 at a yearly rent of £1560; that under the lease the rabbits are reserved to the proprietor with sole right of hunting; and that under the lease the tenant is to have no claim against the proprietor for damage; but the proprietor obliges himself not to allow the rabbits to increase to any injurious extent beyond the stock thereon at the entry of the pursuer, and that he should use means to prevent such increase; and should the tenant at any time intimate to the proprietor that he considers the rabbits are increasing to an injurious extent, the proprietor shall be obliged to kill them, so as to remove all just cause of complaint, and any dispute as to the rabbits shall be settled by arbitration. It was further stated for the pursuer that the rabbits had increased to a most injurious extent on the farm, especially on those portions of it reserved for wintering. The averments of increase in the stock of rabbits were denied by the defender, and he pled that under the lease there was no obligation to enter into a submission. In progress of making up the record the pursuer proposed to introduce an alternative conclusion that, failing an arbitration, the Court should grant decree for damages. This was objected to, as changing the nature of the action, and the objection was sustained. The defender objected that the clause of arbitration to arbiters unnamed was invalid. The Sheriff-Substitute (Barclay) sustained the objection and dismissed the action by the following interlocutor and note:—

"*Perth, 28th January* 1879.—Having heard parties' procurators and made avizandum with the process and debate: Finds that the arbitration clause in the contract of lease between the parties not being part of and essential to the contract, and being to arbiters not named, but to be named in any dispute or difference arising, the same is not enforcible by form of action: Dismisses the action, reserving to the pursuer all other and competent remedy: Finds the pursuer liable to the defender in the expenses of process: Appoints an account thereof to be given in, and remits the same when lodged to the auditor of Court to tax and to report, and decerns. HUGH BARCLAY.

"*Note.*—The lease is by no means clear or consistent as to the matter of arbitration. 1st, There is a complete reservation of all kinds of game to the proprietor; 2nd, an express exclusion of all claim by the tenant for any damage the game may occasion; 3rd, but there is the defensive or protective clause in favour of the tenant, but confined solely to rabbits, that the proprietor shall use means to prevent an increase of them beyond the stock on the farm at the time of the lease, and declared by the lease 'to be so small as not to occasion appreciable damage.' There is no positive obligation undertaken by the proprietor; but the remedy to prevent such increase is, that the tenant '*at any time* may intimate to the proprietor that *he considers* the rabbits to have increased to an injurious extent, and *then* the proprietor shall be obliged to kill the same so as to remove all just cause of complaint; and if any dispute or difference shall arise as to the rabbits, such dispute or difference shall be determined by arbitration, the arbiters being empowered to decide whether and to

what extent the rabbits are injuriously affecting the tenant, and to direct to what extent the proprietor shall destroy or cause them to be destroyed.' It will be here observed that there is no power to assess or award damages, but simply to regulate the stock of rabbits to be *in future* allowed and to rule the measure of their destruction. It will be thus seen that the arbitration and award could not be made once and for all, but would require to be done annually, if not more frequently, seeing that the crops, both vegetable and animal, must necessarily fluctuate with the seasons. What at one period would be no increase of the rabbits and damage thereby occasioned might be distinctly the reverse at another season.

"The chief clause founded on is the following: 'Whereas several references (not hereintofore specially provided for) are hereby agreed to be made to arbitration, the parties hereby oblige themselves in such cases to enter into submission to two neutral men of skill, to be mutually chosen by them as arbiters, with power to the said arbiters, or, if agreed upon, to the parties, to name an oversman in case of their differing in opinion; and it is provided that, if either party when required in writing to name an arbiter refuses or delays within ten days to do so, then the other party may apply to the Sheriff of the county of Perth for the time, or any of his Substitutes, to nominate arbiters, and an oversman in case of difference, and it shall not be competent to bring such nomination or the decision of such arbiters or oversman under the review of any Court whatever.'

"The petition is by no means clear in its demands. 1st, It prays the Court *abstractly* to find that the defender is bound to enter into a submission along with the pursuer as to whether, and to what extent, the rabbits are injuriously affecting the pursuer, and to have it directed to what extent the defender shall destroy them. Following the clause in the lease nothing is said as to an award of damage. 2nd, There is a conclusion to nominate two men of skill. It is not very clear whether this is to be done by the Court or by the defender. It can scarcely mean the latter, because he can only be called to name *one* man. But the connection of the sentences with the previous one grammatically lays the duty on the defender. It is not introduced by the alternative of the defender failing to enter into an arbitration. The last portion of the conclusion again refers to the Court nominating the arbiters, but if so, there was no necessity for either party concurring in the nomination by the Court. And *lastly*, the Court is asked to give decree for damages 'as they (the arbiters) may determine.' There is here some confusion. If the parties enter into a submission to arbiters, either under the first conclusion or under the Sheriff's appointment, the awards would become extra-judicial matters, capable of being enforced without the aid of the Court.

"But the difficulty is whether the clause of arbitration to unnamed arbiters is enforcible at law. There is an obvious distinction in such clauses. Where the clause is essential to the fulfilment of the contract it is good; where an article is sold, the quantity or price to be fixed by neutral men mutually to be named, then it is essential to the contract. So it is between outgoing and incoming tenants, where stock, manure, and fallow are given and received to be estimated by award. But an arbitration *de futuro*, as to all disputes and differences, either general or as to some particular, which may arise during a long period of time, to parties not named is incapable of enforcement. No party can be thus compelled to forego the ordinary tribunals of justice subject to review, and to submit the claims to individuals selected for the time, with the grievance of finality, however erroneous the awards (generally of one man, the oversman) may be. If the clause would be good as to the rabbits it might have been extended to all other species of game. It cannot be argued that a clause of arbitration in a lease would reach to all matters of dispute, such as the stock of the tenant, or to the proper cultivation of his farm. The clause here relied on would not, as in the cases supposed, admit of a dispute being once and for ever concluded by an award. During the whole existence of the lease the tenant might *periodically* have insisted on its being again renewed and enforced,

and that the arbiters might therefore have been necessarily changed at the pleasure of the parties, and give forth very discordant awards. H. B."

The case was appealed, and the Sheriff (Lee) on 16th February affirmed the interlocutor, with the annexed note.

"*Note.*—By the lease in question the proprietor is bound to keep down the rabbits, and he alleges that he has taken means to do so, and has fulfilled his obligation. But the tenant avers that the rabbits have increased to an injurious extent, and that in this way a dispute or difference has arisen as to the rabbits, which under the lease falls to be determined by arbitration as therein mentioned. The question is—it is the only question upon the record as it stands—whether the tenant can enforce, as applicable to this dispute, the arbitration clause of the lease. He demands arbitration as to 'whether and to what extent the rabbits are injuriously affecting the tenant,' and that the arbiters to be appointed shall decide and direct to what extent the defender shall destroy the rabbits, or cause them to be destroyed. He also asks that, on the arbiters or oversman determining said dispute or difference, and deciding and directing as aforesaid, decree should be granted against the defender for payment of £200 as damages for such injurious increase of rabbits, or such other sum as the arbiter or oversman may determine to be the extent or amount to which the rabbits 'are injuriously affecting the pursuer.' Apart altogether from the terms of the prayer, the Sheriff is of opinion that the action cannot be sustained as an action for enforcing arbitration, and cannot conveniently be altered into an action of damages for allowing an injurious increase of rabbits contrary to the stipulations of the lease. As regards the latter point, it is sufficient to observe (1) that the lease does not enable the arbiters, even if named, to ascertain and decern for damages incurred; and (2) that the only conclusions of the action at present insisted on do not enable the Court to assess and decern for such damages. The proposed amendment, if allowed, would be inoperative until the conclusions, as they stand, should have been exhausted. It is in the shape of an alternative conclusion, carefully expressed, so as to have no effect except when the action, as it stands, is at an end. As such it is useless. At least it would not save the necessity of disposing of the existing conclusions, according as the arbitration clause may be found applicable or not, and there would seem to be no expedience, therefore, in allowing such an amendment. With regard to the pursuer's claim to have the defender compelled to enter into a submission, the Sheriff concurs with the Sheriff-Substitute. He is unable to adopt the view that the arbitration clause applied to such a dispute as is disclosed on record is explicatory of the contract of lease, or is, as Lord Deas expressed it, in the case of *Wight* v. *The Earl of Hopetoun* (November 29, 1855, 18 D. 118), 'a part of the contract, so that the question can only be extricated in the particular manner thus provided.' And he holds it to be quite settled that an undertaking to refer future disputes arising out of an alleged breach of contract is not obligatory where the arbiters are not named (*Smith* v. *Wharton Duff*, February 28, 1843, 5 D. 749.—Henry's Trustees, May 28, 1851, 13 D. 1021). The distinction is clearly pointed out in these cases, and also in the case of *Wight* v. *The Earl of Hopetoun*, between arbitration to liquidate a contract and an attempt to enforce arbitration as to a dispute of the kind here disclosed. If the fact be as the pursuer alleges, that the defender has allowed the rabbits to increase to his damage, the ordinary remedy is open to the pursuer. There is nothing in this lease which enables either party to say that that question can only be settled by arbitration. R. L."

Act.—Young.——Alt.—Skeete.

SHERIFF COURT OF ORKNEY.

Sheriffs Mellis and Thoms.

SHEARER *v.* ROBINSON.

Ship—Liability of master under contract in a port taken in stress of weather for necessaries—Question as to the effect of suing master as regards pursuer's claim

also upon owners.—The pursuer sued the master of a vessel which, having sustained injuries in the Pentland Firth, had to run for Stromness, where it was found to be necessary to discharge her cargo. The master contracted with the pursuer to discharge the cargo, and it was admitted that this contract was duly fulfilled. On the master's refusal to pay this action was brought in February 1879, and the Sheriff-Substitute (Mellis) pronounced the following interlocutor:—

"*Kirkwall, 6th March* 1879.—The Sheriff-Substitute having considered the record, productions, and whole process, and having heard parties: Finds (1) that the pursuer, upon the eleventh day of September eighteen hundred and seventy-eight, offered to discharge the vessel Henry of Llanelly at the port of Stromness in Orkney for payment of twenty-three pounds sterling; (2) that of same date said offer was accepted by the defender as master of the said vessel; (3) that the pursuer discharged said vessel between the said eleventh and the twenty-fifth day of September; (4) that the pursuer is entitled to payment of said sum of twenty-three pounds sterling, with interest thereon at the rate of five pounds per centum per annum from the said twenty-fifth day of September until payment; (5) that the defender is personally liable to the pursuer in payment of the foresaid sum of twenty-three pounds sterling: Therefore ordains payment of the said sum to be made by the defender to the pursuer, with interest, and decerns: Finds the pursuer entitled to expenses of process, of which allows an account to be given in, and remits the same when lodged to the auditor of Court to tax and report. JOHN C. MELLIS.

"*Note.*—The only point in dispute in this case is that raised by the defender's second plea in law, viz. as to whether decree can go against the defender personally. It seems quite settled law that the master of a vessel is personally liable under his own contract either with reference to the employment of the ship (Maclachlan on 'Law of Shipping,' second edition, pp. 123, 124), or for repairs or necessaries to the ship, where he does not by express terms confine the credit to his owners only (Maclachlan, *sup.* p. 131), where it is distinctly affirmed that 'the master is always personally bound by a contract of this kind.' The author referred to cites the English case of *Priestley* v. *Fernie*, 34 L. J. (Ex.) 132, as an authority for the proposition that a creditor has an 'election to proceed against the owners or against the master, *but he may not sue both.*' The same case is also quoted to the same effect by the Sheriff of Renfrewshire (Fraser) in a note by him reported in the case of *Benn & Co.* v. *Porret*, 11th March 1868, 6 Macph. 577. The learned Sheriff observes that in the case of Priestley the Court of Exchequer 'declared the law to be that the creditor may sue either the owner or the master, *but not both*' (foot of p. 587). The Sheriff-Substitute has no means of access to the report of the case of Priestley, but the decision of the Court of Session in the case of Benn & Co. seems to ignore the *qualification* of the creditor's right of action, which limits him to an *election* between the owner and master, for the Court held that owner and master (both of whom were sued) were *jointly and severally liable* to the pursuers. Whether or not, however, this decision is to be regarded as conflicting with that in the case of Priestley it is unnecessary to decide, as it seems at all events to be good authority for holding that the master is personally liable to creditors in contracts for the ship, whatever may be the legal relations as to such contracts between himself and the owners. J. C. M."

The defender appealed to the Sheriff (Thoms), and both parties dispensed with argument. The Sheriff pronounced the following interlocutor and note:—

"*Kirkwall, March* 1879.—The Sheriff having considered the defender's appeal and whole process, dismisses said appeal, and adheres to the interlocutor submitted to review, with additional expenses as these may be taxed; and decerns of new for payment by the defender to the pursuer of £23, with interest thereon at five per cent. from 25th September 1878 until payment.

"GEO. H. THOMS.

"*Note.*—The Sheriff has looked into the English authorities. What the effect of the pursuer's selecting the master as *sole* defender is seems still to be an open question in Scotland. Priestley's case (in opposition to what is the law in America—Story on Agency, sec. 295, and 3 Kent's Coms. 161) seems almost to settle the point in England. In Priestley's case, however, the Court of Exchequer expressly stated that '*Leslie* v. *Wilson*' (Nov. 28, 1821, 3 Broderip and Bingham, 171) 'is not opposed' to their decision. In Leslie's case the plaintiff sued—as in the Scotch case of *Benn & Co.* v. *Porret*—the owners and captain in the same action, and got decree against all of them jointly. All these cases negative the defence which has been stated in this action, and to which the Sheriff-Substitute has refused effect.

"The Sheriff observes that no question has been raised by the parties as to the discharge of the cargo being a matter of necessity, and, accordingly, this case has been disposed of on that footing.

"The renewed decerniture seems to be necessary in consequence of the way in which that by the Sheriff-Substitute is expressed. G. H. T."

SHERIFF COURT OF FALKIRK.

Sheriff-Substitute BELL.

ALLAN *v.* RIDDELL.

Medical practice—Mutual contract.—The facts of the case appear in the annexed interlocutor :—

"*Falkirk, 8th March* 1879.—The Sheriff-Substitute, having considered the closed record, proofs, productions, and whole process : Finds in point of fact, 1st, that the pursuer and the defender, after repeated communings and correspondence, upon 4th March 1878 entered into a mutual contract in terms of the draft agreement 9/4 of process ; 2nd, that by the said mutual contract the defender undertook to pay to the pursuer the sum of £150 as a gratuity or premium for the goodwill of his practice at Falkirk (club as well as private) and for an introduction thereto ; 3rd, that the said sum of £150 was to be paid by instalments, viz. £20 on 4th March 1878, and the remainder by quarterly payments of £15, beginning on 1st June following ; 4th, that it was to be understood that the said agreement in no way bound any member of the pursuer's medical club ; 5th, that the defender undertook to enter on the duties of the practice upon 4th March : Finds that, on the other hand, the pursuer undertook to hand over to the defender his practice, as well private as club, and to introduce him thereto during one week from 4th March, either personally or by his son Thomas Allan, or by some other representative; but it was latterly distinctly understood between the parties that the pursuer would be unable to act personally in that matter, and the defender acquiesced in that duty being devolved upon Thomas Allan : Finds that the pursuer also became bound to give to the defender the occupancy of Springfield House, which the pursuer then occupied as a yearly tenant at the rent of £30 per annum, upon the footing that the defender was to pay the proportion of the rent applicable to the remainder of the current half-year between 4th March and Whitsunday, for which period only the pursuer could guarantee the occupancy : Finds that on 4th March, in accordance with the mutual contract then concluded, the defender paid to the pursuer the first instalment of £20, and having taken possession of Springfield House entered upon the duties of the practice, and the pursuer on the morning of the 3rd March left Falkirk : Finds that the defender has not proved that the pursuer induced him to enter into the agreement by false, exaggerated, and misleading representations : But finds that the pursuer has failed to give to the defender an introduction to the members of his club or to his private patients, stipulated in the mutual contract, with the exception of introducing him to some members of the club committee in their official capacity, and to nine or ten at most of his patients,

forming a very trifling quota of his patients, whether club or private: Finds that the pursuer has not proved that this failure to give the promised introduction has been caused by the fault of the defender, and the pursuer has not offered to make any other arrangement for completing the introduction stipulated: Finds, *in law*, that the pursuer, having failed to perform an integral and essential part of the mutual contract binding upon him, is not entitled to demand from the defender the further fulfilment of his part of the contract, and that the sum of £20 already paid is an ample equivalent for the proportion of rent of Springfield House and for the partial introduction which was given; therefore assoilzies the defender from the conclusions of the summons, finds him entitled to expenses subject to modification, allows an account thereof to be given in, and remits the same when lodged to the auditor of Court for the purpose of being taxed, and decerns. ROBERT BELL.

"*Note.*—The Sheriff-Substitute thinks that the terms of the mutual contract as ultimately agreed upon are accurately stated in the foregoing interlocutor, and he is of opinion that the defender has been unsuccessful in proving—as averred in his defences—that he was induced to enter into the agreement by statements made by the pursuer which were false or wilfully calculated to mislead. 1st, The original advertisement in the *Scotsman* of 11th February 1878, number 14 of process, did not contain any exaggerated statement. The pursuer's medical practice has been shown to have been fairly described as a 'large good going club and private practice in the Falkirk district;' and the more detailed statements made in the subsequent correspondence have been fully borne out by the pursuer's deposition and his cash-book, 9/16 of process. 2nd, The statements made in the pursuer's letter of 17th February as to the population of the Falkirk district are substantially correct; and although these statements are not strictly accurate as to the number of medical men practising in the district—as distinguished from the town—and are no doubt erroneous as to the unpopularity of the five more prominent practitioners who were resident in Falkirk, the Sheriff-Substitute does not think that these statements, which includes matter of opinion, can be characterized as false, or that they were made with the view of misleading. 3rd, The pursuer was, in the Sheriff-Substitute's opinion, warranted in stating that he had been authorized by a sub-committee of the club to look out for a successor, and that the club people had promised to stick by any one whom he might recommend to them; for he at the same time qualified this statement by explaining that every member of the club was free to join where he pleased, and that a good deal depended, as regards success, upon the medical man's own exertions and popularity. It would certainly have been more proper and more considerate towards the defender if the pursuer had at once distinctly informed him that a small minority of the committee wished to have Dr. Haig as their medical officer, and that symptoms of dissatisfaction with the actings of the committee had been manifested among the members of the club. But at the beginning of the negotiations with the defender the pursuer was warranted, from Dr. Haig's letters, 7/2 and 7/4 of process, in believing that he would not come to Falkirk without the consent of the pursuer and the committee. There is, however, reason to doubt upon the evidence whether the pursuer did eventually, before the contract was completed, make the defender aware that Dr. Haig had, by his advertisement in the *Falkirk Herald* of 23rd February, number 9/5 of process, entered the field as a competing practitioner at Falkirk, and that in fact it was Dr. Haig who was negotiating with the railway company for a lease of Springfield House. A full explanation as to Dr. Haig's possible rivalry would have been fair and proper towards the defender, and it is doubtful whether such was given. But, at the same time, there has not been proved to have been such a *suppressio veri* as to form a ground for setting aside the contract. 4th, It has been established by the proof, written and oral, that the pursuer did not hold out to the defender any promise to secure Springfield House after Whitsunday. The pursuer had, until he received Mr. Wieland's letters of 27th and 28th February, probable grounds for believing that there would be no serious difficulty as to the house,

and he certainly conveyed that impression to the defender, as he had also done to the committee, in rather mysterious terms. But the pursuer does not appear to have wilfully, or indeed in point of fact, misled the defender on that matter. Dr. Riddell's letters 10/10, 10/20, and 10/21 of process show that he was fully aware of the uncertainty as to the occupancy of Springfield after the term, as well as in regard to the extent of support from the club members; but he had gone so far (perhaps too rashly) in relinquishing his practice at Thornton, that he felt constrained to run the risk of coming to Falkirk in the hope that matters might be satisfactorily arranged. There is a painful and perplexing difference between the evidence of the defender and his wife on the one hand and that of the pursuer and his wife on the other, as well in regard to the matter of the house as in regard to the accuracy of the defender's averment, that on the 4th of March, before finally concluding the agreement and paying the first instalment of £20, he had received a distinct assurance from the pursuer 'that he had just been to Falkirk Foundry, and had received a guarantee from the committee that they would countenance and support the defender as his successor for a year from the date of entering on his practice.' But the Sheriff-Substitute cannot hold that the defender (upon whom the *onus* lay) has proved that the pursuer gave any stronger assurance than that which was expressed in his letter of 17th February before quoted—although it may be readily believed that he expressed a confident expectation that the committee would adhere to their previously declared intention of support; and it is of importance to keep in view that there is no evidence to show that the committee departed from their intention, although the club members had not been equally steady in their adherence to the defender. So far the defender has failed in making good his contention, on the ground of having been fraudulently misled by the pursuer. But the Sheriff-Substitute is of opinion that the pursuer has failed to implement his part of the mutual contract as regards introducing the defender to his patients. That was the chief, and indeed almost the sole, equivalent which the defender was to receive for the premium which he had undertaken to pay, and in point of fact that introduction has not been given, except to some members of the committee in their official capacity, and to a very small number of the pursuer's patients, of whom the list number 10/3, which is not a complete one, contains upwards of sixty names. The pursuer maintains that the defender has only to blame himself for the want of an introduction, but the Sheriff-Substitute cannot arrive at that result. The question rests very much between the defender and the pursuer's son as to the circumstances of their misunderstanding, and it is scarcely possible to eliminate the facts from their conflicting statements. But it sufficiently appears that young Allan showed remissness and indifference in discharging the important duty which he had undertaken, and that there was considerable loss of temper (perhaps not unnatural under the circumstances) on the defender's part, which led to the unseemly squabble in Mr. Binnie's shop. Mr. Binnie's evidence shows that intemperate language was used on both sides, but it corroborates the defender as to his having made no accusation against the pursuer; and in the circumstances Mr. Thomas Allan, while acting as his father's representative, was not entitled to take up the position of demanding an apology as the condition of going on with the introduction, as appears from his letters 11/1 and 11/8 of process, and it has not been proved that Mr. T. Allan subsequently withdrew this condition. On the contrary, the defender and Mrs. Riddell concur as to his having renewed the demand for an apology on the occasion of his last call at their house. The defender's letters of Thursday (7th March) and 12th March are expressed in no unfriendly spirit and are quite respectful towards the pursuer, and bring before him in a reasonable manner his cause of complaint as to the failure to give an introduction, and it was incumbent on the pursuer to make some other satisfactory arrangement for fulfilling his obligation under the mutual contract. But, on the contrary, he did not do so, and it appears from his letters to the defender, 10/18 and 10/19, and also from his correspondence with George Forrester,

chairman of the club committee, numbers 10/12-15 of process, that he had entirely adopted his son's side of the matter, and that, instead of proposing to make some other arrangement for giving an introduction, he was sedulously taking measures for bringing the defender into discredit with the club committee, and was threatening legal proceedings against the defender. It is also of importance to keep in view that when the latter letters were written by the pursuer he was in possession of Mr. Binnie's letter, 9/14, and of Mr. Forrester's letter, 9/13 of process, which should have satisfied him as to the groundlessness of the supposed imputation by the defender. There is nothing in process to show whether there were any subsequent communications between the parties before this action was raised, and it rather appears that the defender assumed that the mutual contract had come to an end in consequence of the pursuer's failure to give the stipulated introduction; and that, as indicated in his letter 9/11 of process, he considered that he had already, by the sum of £20, made adequate payment for the proportion of rent due by him, and for the partial introduction which had been given. Here it may be observed that it is not easy to estimate the injury which may have been done to the defender's prospects of success by the pursuer's communications to George Forrester, who, although friendly to the defender, appears in compliance with the pursuer's request to have communicated the pursuer's letters to the committee, along with Mr. Thomas Allan's statement, 10/14, which were calculated to raise impressions injurious to the defender, and to increase those feelings of dissatisfaction with the whole arrangement which had already been aroused by misunderstandings as to the actings of the committee, and as to the curtailment of the advertisement in the *Falkirk Herald* of 23rd February, intimating Dr. Riddell's appointment, and by the failure of Dr. Allan to give an introduction personally to the families of his patients, which seems to have been expected upon the foregoing facts, the Sheriff-Substitute is of opinion that, *in law*, the mutual contract libelled on has come to an end, and that the defender is entitled to be assoilzied, with expenses; but in respect that a considerable portion of the expenses has been caused by the defender's plea that he had been induced to enter into the agreement by the pursuer's false, exaggerated, and misleading representations, the amount of expenses will be subject to modification. The principle of law upon which the defender has been assoilzied is clearly expressed by Mr. Erskine in his Institutes, Book III. Title iii. sec. 86, in the following words: 'No party in a mutual contract where the obligations in the parties are the causes of one another can demand performance from the other if he himself either will not or cannot perform the counterpart, for the mutual obligations are considered as conditional.' This principle is also recognised by Stair, 1. 10, sec. 16, and More's Notes, p. lxx; and has been laid down by Mr. Bell in his Principles, sec. 71, and in his Commentaries, fifth ed. vol. i. p. 431. R. B."

SHERIFF COURT OF ABERDEEN.

Sheriff Comrie Thomson.

TROUP *v.* KILLOH.

The Kinkell Market Case.—Sheriff Comrie Thomson has just pronounced a judgment of some importance with regard to the right of pitching tents on the Kinkell Market Stance. The judgment is given in an action raised at the instance of James Troup, innkeeper, Banks of Urie Inn, Inverurie, against James Killoh, farmer, Ardmurdo, or Kinkell, in the parish of Keith-hall. The pursuer sued for £25 in name of damages in consequence of the defender having illegally and unwarrantably, on or about the 9th October last (being the day of the Kinkell market), attacked and forcibly demolished the pursuer's tent, which had been erected on the market stance; and assaulted the pursuer and the other persons in the tent; and prevented him from exercising his calling at the market. The pursuer alleged that he took a stance from Mr.

Ingram Smith, who had the letting of the stances. This stance, he alleged, was his usual stance, and the one next the horse market. The defender stated that it was the rule to allow only one refreshment tent in the horse market, and that this was occupied by Mr. Smith, and that the defender's tent was No. 10 in the row, and not in the horse market at all. The following are the interlocutor and note, which sufficiently explain the case :—

"*Aberdeen*, 11*th March* 1879.—Having considered the cause : Finds that on the occasion libelled the pursuer erected his tent upon a part of Kinkell Market Stance which had not been let to him, and for using which he had no permission from the proprietor of the market or from any one having his authority : Finds that the defender is tenant and occupant of the market stance, and tacksman of the customs of the market : Finds that before the pursuer had completed the erection of his tent the defender warned him that it must be removed : That the pursuer nevertheless persisted in keeping his tent where he had put it up, and maintained his right to do so in defiance of the defender : That after repeated subsequent warnings and orders to remove, which were still disregarded by the pursuer, the defender caused the tent to be taken down : Finds that the defender was justified in doing so : Therefore assoilzies the defender from the conclusions of the action, with expenses, etc.

"JOHN COMRIE THOMSON.

"*Note.*—Under what is known as the 'Kintore Entail,' which is dated in 1695, the present Earl of Kintore has 'the privilege and liberty of holding and keeping a free fair or marcat, commonly called Michael Fair, upon the lands of Kirktown of Kinkell yearly, with all and sundry customs, fees, profits, casualties, and duties whatsomever used and wont,' together with the office of bailiary of the fair, and with all fees, liberties, profits, and privileges of the office of bailiary.

"By the defender's lease of the farm of Lower Kinkell it is provided that 'the Kinkell market shall be held as formerly, and the tenant of the farm shall be entitled to the customs payable thereat, with power to let the same.' 'The proprietor reserves power to give up the market, or to withdraw the tenant's right to the customs, on allowing him £10 a year deduction from his rent.'

"The regulation of the market in all respects is in the hands of the tenant. He sublets the customs of the fair, but he has not denuded himself of any other right or privilege derived by him from the proprietor. Among other matters which fall within his power of regulation is the number and position of the refreshment tents. In this the proprietor and his tacksman are absolute. I therefore can give no countenance to the contention of the pursuer that he or any other publican is entitled as matter of right to set up a tent, and carry on his trade in any part of the market. The common law confers upon the public certain rights at public markets. For example, any one is entitled to come to the market for the purpose of buying and selling, or of making bargains, of hiring, etc., so long as these transactions are of the class for which the market exists. Kinkell market is a horse and cattle market. The purveying of refreshments is a mere adjunct to the transactions of buying and selling animals. It is in no sense a market for the buying or selling of drink or other refreshments, and I am of opinion that it would be quite within the power of the proprietor of the market to make a rule, and to insist on the observance of it, that no refreshments whatever should be sold, or to prohibit certain forms of refreshments which are commonly to be found at such places. In the present instance it has for three years past been the rule of this market, in the interests of order and the quiet conduct of business, to draw a distinct line of separation between the cattle and the horse markets, and also to permit no more than one refreshment tent in the latter market. It is superfluous to inquire whether this is a beneficial arrangement or not, although it is obvious that the constant running out of horses makes a market where they are being sold a more dangerous place, if there is any crowding or confusion, than a cattle market, where the beasts are tied up. It

is only of importance to settle that, be the rule good or bad, the proprietor had the right to make it, and to enforce it.

"The pursuer here has been in the habit for many years of carrying on respectably, and apparently not without profit, a trade which leads him to frequent markets and sell refreshments in a tent or booth. On the occasion in question he had set up his tent within the prescribed boundary of the horse market. About this matter of fact the evidence leaves no room for doubt. He either broke or removed the dividing wire, and taking the most favourable view for him, namely, that he acted under a misapprehension, his mistake was pointed out to him before he had finished putting up his tent; and the illegality of his act was insisted upon emphatically more than once before the tent was removed.

"I have already indicated the grounds upon which I am unable to sustain the pursuer's claim to put his tent where he did as a matter of right. But he pleads alternatively that he had got no warning that it was a regulation of the market that only one tent was to be allowed in the horse market; and also that the site on which he pitched his tent had been let to him by the sub-tacksman. The pursuer's case, however, fails on both these grounds also. It is true that there were no printed or published regulations to guide the tent-owners; but the afternoon before the market had been fixed as a time when the stances would be allocated, and the pursuer failed to attend on that occasion, although invited to be present. Had he been there he would have heard a distinct prohibition by the tacksman against erecting a tent beyond the boundary wire. Besides, it is incredible that what was well known to the other tent-owners should not have been known by the pursuer, both from the general understanding of the market and from what had occurred in the previous year. On that occasion the pursuer had occupied a portion of a stance which he had not taken, and to which he had no right, although the tacksman seems to have tolerated him; and an attempt by another publican to put a second tent in the horse market was stopped.

"But even supposing the pursuer was honestly ignorant that he was breaking a rule, the fact remains that he was occupying a place to which he had no title. It had not been let to him. He was a mere intruder or squatter, asserting a right to put his tent where he chose. He says, it is true, that there had been let to him the same stance as he had had the previous year. Now, what happened in the previous year was this: Stance No. 10 was let to him, but he did not like it, and did not occupy it, and he put his tent up without permission in a part of No. 1 stance, which the tenant of that stance did not require; or (to put it otherwise) on a blank space which had not been let to anybody, lying between No. 1 stance and the boundary of the two markets. He pushed himself in there, and no one seems to have thought it worth while to put him out. But on the present occasion No. 1 stance was pinned off, close up to the boundary wire, so that the pursuer could not put his tent between No. 1 and the horse market. He gained his point, however, by stretching the boundary, or in other words, by breaking or moving the wire. If it be true that any place was actually assigned to the pursuer, it was stance No. 10; because that was the stance which he had taken, although he had not occupied it, in the previous year. It cannot be that the place which he had actually occupied without taking it in the previous year was let to him this year, because no such place was in existence, that is, there was not space between No. 1 and the wire. Therefore, in no possible view can it be held that he ever had acquired a right to the place on which he chose to put up his tent.

"Thus, neither by the common law, nor by contract, had the pursuer right to occupy with his tent any part of the market whatever, unless it were No. 10 stance, and that stance he himself repudiates.

"The only remaining question, therefore, is whether the defender was entitled to expel the pursuer in the manner that he did. I am of opinion that he was. Of course, there is a very important sense in which no man is allowed to take the law into his own hands. But there are some exceptions to

that rule, generally occurring in cases where a wrong is being suffered, for the prevention of which the movements of the law are too slow. If a man is found in the garden of another stealing fruit, the owner, if he is physically capable of turning out the intruder, is entitled to do so, without waiting for an officer of the law or a magistrate's warrant. He must, of course, use no more violence than is necessary to effect his purpose. In the present case the most ample warning was given to the pursuer, and he had abundant opportunities of taking down his tent. But he took up a position of defiance. The defender was not only bound by his undertaking to the proprietor of the market to observe certain regulations, but he was under a tacit obligation to the publican who had got the monopoly of the horse market refreshment, and to all the other tent-owners, to keep the pursuer and everybody else from erecting his tent beyond the boundary line. There was no course open to him in the fulfilment of these obligations and undertakings except the course which he adopted. His conduct was unaccompanied by any violence, and the trifling damage sustained by the pursuer must be laid at the door of his own obstinacy. J. C. T."

Act.—M'Lennan.——Alt.—Duncan.

DEBTS RECOVERY COURT OF BANFFSHIRE.

Sheriff Scott Moncrieff.

DALLAS' TRUSTEE *v.* BOW.

Compensation.—Circumstances in which held that there was *concursus debiti et crediti* so as to support the plea of compensation.

In this case the following interlocutor was pronounced:—

"*Banff, 17th March* 1879.—Having heard parties' procurators on the proof led and whole cause, and made avizandum: Finds that the defender has incurred to William Dallas, merchant in Macduff, the amount of the account sued for, being £17, 3s. 10d.: Finds that the pursuer is the trustee upon the sequestrated estate of the said William Dallas: Finds that there falls to be deducted from said sum the sum of £15, 18s. 3½d., being the amount of a counter account due by the said William Dallas to the defender: Therefore sustains the pleas stated for the defender, and decerns against him for the sum of £1, 5s. 6½d., being the balance of the amount now sued for after deducting the said sum of £15, 18s. 3½d.: Further finds the defender entitled to expenses of process, and decerns at his instance against the pursuer as trustee foresaid for the sum of £6 of taxed expenses of process.

"*Note.*—The circumstances in this case are rather peculiar, and the point raised one of some difficulty. The accuracy of both accounts is admitted, but to the defender's plea of partial compensation the objection is raised by the pursuer that there is here no *concursus debiti et crediti*, because the counter account is due not by the bankrupt, but by his father, Mr. Alexander Dallas. The bankrupt succeeded his father in what was his principal business some years ago. Since that time he has lived in his father's house, and, according to his statement when examined in bankruptcy, the household has been almost maintained out of his business. Mr. Alexander Dallas was a customer of the defender, but for years back the accounts for the Dallas household due to the defender have been settled by the son William Dallas, and since 1876 they appear in the books, and have been made and sent out in his name. No objection was ever taken to this. The defender was never told that William Dallas would not hold himself responsible for these accounts. On the contrary, they were always settled by him in precisely the same way as the defender now maintains the present account should be settled, viz. by squaring them with accounts due by the defender to William Dallas personally. Further, during this period the defender had one separate transaction with Mr. Dallas senior,

and what took place upon that occasion certainly must have led the defender to believe that young Mr. Dallas was the person to whom to go for the settlement of his ordinary accounts. But, indeed, the bankrupt himself does not deny that had he continued solvent he would have recognised the present counter claim. If so, I do not think that, in the circumstances proved, the trustee is entitled to reject it. No doubt, as the items which form the counter account went to a house of which Mr. Dallas senior was the nominal master, there is a presumption that he is responsible for them, but such a presumption may be overcome by proof, and I think it has in this ease. It may be observed that in point of fact neither the father nor son ordered the goods, Miss Dallas having taken charge of the household.

"The pursuer takes a special objection to compensation being pleaded against the two last items in the account sued for. It is true that these items were obtained by the defender from William Dallas on the eve of his bankruptcy. But surely this fact, even along with the defender's admission of having heard some rumours of Dallas' insolvency, is not sufficient proof of an attempt to secure an illegal preference. There is nothing to show that the defender and bankrupt are acting in concert. On the contrary, the bankrupt did not give up the defender as one of his creditors. If he had done so this action might possibly have been avoided."

Notes of English, American, and Colonial Cases.

SUPREME COURT OF ILLINOIS.

GRIDLEY *v.* CITY OF BLOOMINGTON.

A city ordinance imposing a fine upon any one permitting snow to remain on the sidewalk abutting premises owned or occupied by him beyond a specified time, held, *invalid. Such an ordinance is not a proper exercise of municipal police power.*—Complaint under oath was made charging that defendant permitted snow to remain upon the sidewalk abutting upon premises occupied by him as a "wood and stable lot," contrary to an ordinance of the city, which provides that, "whoever being the occupant of any occupied premises, or the owner of any vacant premises, shall suffer any snow to remain on any sidewalk or footway adjacent thereto, longer than six hours from the time the snow ceases falling, or if the cessation be in the night time, then longer than six hours after sunrise on the next morning, shall be fined five dollars, and be subject to a like penalty for each day such snow so remains after the first penalty has been incurred."

Proof was made that the defendant, on the 16th day of February 1875, owned and occupied lot three in White's addition to Bloomington, as a wood and stable lot; that there was a sidewalk on the south side of the lot which abutted on Grove Street; that defendant did not remove the snow that had fallen on the sidewalk two or three days before to the depth of several inches, within six hours after sunrise on the day mentioned in the complaint; and that the sidewalk in question was within the corporate limits of the city.

It was admitted for the defence that White's addition to Bloomington was laid out by James White on the 7th day of April 1856. On the trial the defendant was found guilty and fined in the sum of three dollars; and from the judgment rendered against him defendant prosecutes his appeal to this Court.

Scott, J.—The ordinance under which defendant was prosecuted imposes

a fine upon any one who shall permit snow to remain on the sidewalk abutting premises occupied or owned by him longer than a period of six hours after it ceases to fall; or if the cessation is in the night time, then longer than six hours after sunrise the next morning.

The validity of that ordinance is the only question made on the argument. It was admitted the lot occupied by defendant was one of an addition to Bloomington that was laid out in 1856, and hence it follows, under the decisions of this Court, the fee of the street in front of the premises was either in the original proprietor or in the Corporation.—*I. B. & W. R. R. Co.* v. *Hartley*, 67 Ill. 439; *Gebhardt* v. *Reeves*, 75 id. 301.

The public had an easement over the street in front of the lot owned and occupied by the defendant, and it makes no difference, so far as this decision is concerned, whether the fee of the street passed by the plat and dedication to the Corporation, or whether it remained in the original proprietor. It is plain defendant has no other interest in the street in front of his property than any other citizen of the municipality. The same is true of the sidewalk. It is a part of the street set apart for the exclusive use of persons travelling on foot, and it is as much under the control of the municipal government as the street itself.

The owner of the adjacent lot is under no more obligation to keep the sidewalk free from obstructions than he is the street in front of his premises. He may not himself obstruct either so as to impede travel on foot or in carriages. It will be conceded the citizen is not bound to keep the street in front of his premises free from snow or anything else that might impede travel. Then upon what principle can he be fined for not removing snow or other obstruction from the sidewalk in which he has no interest other than what he has in common with all other persons resident in the city. It is certainly not upon the principle under which assessments are made against the owner for building sidewalks in front of his property. The cases are not analogous. Such assessments are maintained on the ground the sidewalk enhances the value of the property, and to the extent of the special benefits conferred they are held valid. It would be absurd to suppose that assessments for benefits for local improvements could be enforced by fine or penalties as in the ordinance under which defendant was fined.

Nor do we think this ordinance can be upheld as an exercise of the police power inherent in all municipal governments. It was expressly decided by this Court in *City of Ottawa* v. *Spencer*, 40 Ill. 211, that local improvements of either sidewalks or streets cannot be compelled under the general police power. The Legislature must afford the necessary power for constructing all needful improvements, subject to constitutional limitations, and when one mode of making such improvement is sanctioned by the Constitution, no other can be adopted.

Keeping streets and sidewalks in repair and free from obstructions that impede travel or render it dangerous, is referable to the same power as for constructing new improvements. The sidewalk, as was declared in the case cited, is as much a public highway, free to the use of all, as the street itself, and upon principle it follows, the citizen cannot be laid under obligations under our laws to keep it free from obstructions in front of his property, at his own expense, any more than the street itself, either by the exercise of the police power, or by fines and penalties imposed by ordinance or by direct legislative action.

Our conclusion is, the ordinance in question is invalid, and the judgment must be reversed and the cause remanded.

Judgment reversed.

THE
JOURNAL OF JURISPRUDENCE.

RECENT DECISIONS RELATING TO INSOLVENCY.

The trustee.—During the interval between sequestration and the appointment of a trustee it is competent to appoint a judicial factor for the management of a bankrupt estate. Power to appoint such a factor is conferred by the 16th section of the Act 19 and 20 Vict. c. 76. In the case of *Partridge* v. *Baillie* (December 9, 1873, 1 Ret. 253) it was held in the Sheriff Court that their appointment could only be made prior to the award of sequestration, but the Court of Session refused to accept this narrow construction of the Act. As Lord Cowan remarked, "such an appointment may be especially necessary after sequestration."

Election of trustee.—The case of *Wiseman* v. *Skene* (March 5, 1870, 8 Macph. 661) raises the question, "whether when a person is nominated as a trustee, and supported by a body of creditors, and he does not choose to compete with the candidate of another portion of the creditors who has at the meeting for the election of a trustee obtained an apparent majority of the votes, his supporters may enter into a competition on their own behalf, and have him declared elected if they can satisfy the Sheriff that he was supported by a majority of creditors entitled to vote." The Sheriff in this case had sustained their title to do so, and the Court held that he was right. The Lord President observed, "The statute contemplates that the creditors are the parties to conduct the competition. It is to them that the statute refers, when in the 69th section it provides that the Sheriff shall hear parties *viva voce*, and declare the person or persons trustee or trustees in succession whom he shall find to have been duly elected." The 71st section of the Act provides that the judgment of the Sheriff declaring a trustee elected "shall be final, and in no case subject to review in any Court or in any manner whatever." In the case of *Brown* v. *Lindsay* (March 2, 1869, 7 Macph. 595) we see an attempt to

bring such a judgment under review by way of reduction, and the Court did not consider it in all cases impossible to do so. Lord Cowan said, "No case has been cited to us in which either under the present or the previous Act (which contained a similar clause) the finality of the Sheriff's judgment has been impugned. That there may not be relevant grounds for doing so I am far from asserting." And Lord Benholme, "I do not say that in no case can an objection which has not been stated to the Sheriff not be stated here in a reduction." But it seems clear that no objection which the parties had an opportunity of taking, and failed to take, can form the ground of subsequent proceedings elsewhere. In the case of *Rankine* v. *Douglas* (July 19, 1871, 9 Macph. 1053) Lord Deas said, "The Lord Ordinary holds that the clause of the statute which declares the Sheriff's judgment final excludes him from the consideration of what the Sheriff did, whether competent or not. I am not prepared to concur in that. I think it may be perfectly competent, notwithstanding that clause, for a party to come here in proper form by appeal against judgments of a Sheriff which may be shown to be beyond or in the face of a statute." But there must in any case be an appeal, and that taken within the limit of eight days provided by the 170th section of the Act. Accordingly the Court in this case refused to pass a note of suspension, on the ground that if the judgment of the Sheriff-Substitute was competent under the 71st section of the statute it was final, and that if not it fell under the 170th, which had not been taken advantage of. It seems clear from the case of *Fowlis* v. *Downie and others* (October 27, 1871, 10 Macph. 20) that it is only when the Sheriff has not acted in exercise of his statutory jurisdiction that an appeal from a judgment pronounced by him under the 71st section of the Act could be competent. In this case it was contended in an action of reduction and declarator that the Sheriff's interlocutor declaring and confirming a certain party as trustee had proceeded upon pretended minutes lodged with him. "The question," said the Lord President, "which was the true minute was quite within the Sheriff's competency to decide, and I do not see in what other way the point could be determined. He cannot declare any person to be elected trustee until he has the true minute before him. And therefore he must first satisfy himself which is the true minute. That being so, the 71st section precludes us from reviewing the Sheriff's judgment in any form or to any effect."

Duties and liabilities of trustee.—We next notice one or two cases relating to the duties and liabilities of trustees under sequestrations. The case of *Scobie* v. *Hill's Trustee* (November 23, 1869, 8 Macph. 161) is instructive. It was held in that case, in the first place, that a trustee is bound to take measures to compel a bankrupt to lodge a state of his affairs in due time; and, in the second place, that a creditor is not debarred from participating in a final dividend although he has not lodged his claim within the

statutory period, if his failure to do so has arisen in consequence of the trustee's neglect to send notice. The important point of the right of a trustee in certain circumstances to carry on for the advantage of creditors contracts in which the bankrupt was engaged at the time of the sequestration was discussed in the case of *Anderson* v. *Hamilton & Co.* (January 22, 1875, 2 Ret. 355). The bankrupt was under a contract to supply iron for ships which were to be built. Twenty-six days after the insolvency the trustee wrote offering to go on with the contract, and his offer was refused. He then brought an action of damages. The case was decided against him on the ground that he had not declared his intentions to go on *tempestive*, but the question of his right to carry on such contracts was raised. The Lord Ordinary (Young) remarked, "With respect to the right of a trustee to adopt advantageous contracts made with the bankrupt, and to enforce their execution for the benefit of the estate, I did not understand it to be disputed. But it exists within limits, and without attempting to express and guard a rule on the subject for general guidance, but confining my attention to the particular case, I venture to doubt whether it is according to the right and duty of a trustee in bankruptcy to involve in the risk of a contract of so speculative a character and having so long currency as that now before the Court. . . . To fulfil or secure the fulfilment of such contracts is beyond the scope and purpose of sequestration in bankruptcy, which is realization and distribution."

In the Inner House the Judges were of opinion that there was nothing in the nature of such a contract to prevent the trustee taking it up, provided there was no delay in his doing so. Lord Neaves said, "When there is no *delictus personæ* in a contract the creditors and trustee of a bankrupt contracting party are, in general, entitled to take it up, provided they do so timeously, and do not interfere with the equitable rights of the other contracting party, who must not be subjected to indefinite delay or disappointment."

Under section 159 of the Bankruptcy Act, the Accountant in Bankruptcy is to report the misconduct of trustees and commissioners to the Court, "who after hearing such trustees or commissioners thereon, and investigating the whole matter, shall decide, and shall have power to censure such trustees or commissioners, or remove them from their office, or otherwise to deal with them as the justice of the case may require." In commenting upon this clause in the case of *Peacock's Trustee* (December 17, 1869, 6 Macph. 158), the Lord President said, "It appears to me that the true construction of this clause is, that when a matter is competently before us by the report of the Accountant in Bankruptcy, in terms of the statute, we may in disposing of the case do anything which the statute authorizes us to do, even although in other circumstances a petition or some such procedure at the instance of the creditors would have been necessary to enable us to interfere; in short, that the Ac-

countant's report in a case of this kind brings before this Court for its disposal the whole matter embraced by the report." The trustee in this case had violated the 83rd section of the statute by allowing a sum of more than £50 to remain without excuse in his own hands for a period exceeding ten days. The Court held that the terms of that section relating to the dismissal of the offending trustee are imperative and left them no choice. In the case of *Lang* v. *Hally* (March 19, 1870, 8 Macph. 753) the Court removed a trustee who had failed to perform his duty upon the report of the Accountant in Bankruptcy, and in giving judgment the Lord President said, "I have no hesitation in expressing my opinion that it is the duty of the Court to remove the respondent from the office of trustee, even although our doing so may be contrary to the wish of the creditors on the sequestrated estate, or a majority of their number." In that case the question was raised, whether a petition for the removal of a trustee was competent at the instance of a party who was not a creditor. Lord Kinloch indicates circumstances under which such a petition might be competent, *e.g.* where one interested in the residue of a sequestrated estate sought to protect that estate from the improper actings of a trustee. In *Robertson* v. *Mitchell* (May 17, 1871, 9 Macph. 741) the petition for the removal of the trustee was at the instance of the bankrupt himself. The Court did not *de plano* dismiss it as incompetent, but they refused it after ascertaining that the creditors were favourable to the trustee. "It must be kept in mind that the whole principle and policy of the bankrupt law is to make the creditors absolute masters and owners of the bankrupt's estate, to the utter exclusion of the bankrupt himself during the subsistence of the sequestration. No doubt when the creditors are divided in opinion the minority may bring their resolution under review, and this Court will decide between them; but when they are unanimous their resolutions are absolutely binding" (*per* Lord President). A petition for the control of a trustee containing a prayer for censure was presented to the Bill Chamber. It was held that such a petition was not authorized by the Bankruptcy Statute, and was competent at common law, being in the Bill Chamber, and without the concurrence of the Lord Advocate, although of a penal nature (*Paterson* v. *Robson*, November 16, 1872, 11 Macph. 76).

THE GREAT UNPAID.

"For God's sake, gentlemen, give me a chance! I was never in prison. If you send me I'll lose my work. If you give me time I'll pay all." This is a fitting text for the remarks we propose to make upon the unpaid magistracy. The piteous words were uttered by a labourer named Moran, who a few weeks ago was summoned

before the Chester magistrates for neglecting to contribute towards the support of his children in the workhouse. These children were six in number, they were admitted to the workhouse last September, and their father then agreed to pay 10s. a week towards their support. The mother was in an asylum. At the time when he was summoned Moran had only paid in all 14s., but he alleged that within a fortnight of the admission of the children he was laid up by an accident for a month, and was in the infirmary for two weeks, this being corroborated by an entry in the police books showing that in September he was carried to the infirmary on a stretcher. On his recovery frost had set in, and he said that for ten weeks he was out of employment, in the end only getting five days a week of work, while even on full pay his wages were but £1. Then debt had followed on his illness, and he had been unable to pay more.

The sentence was one month's imprisonment with hard labour. The magistrates refused to listen to the circumstances, and there the matter stood. The decision, however, was not suffered to pass without remark, and vigorous exertions were, to their honour, made by the precentor of the Cathedral, and by other gentlemen. The result was that questions were asked in the House of Commons by Sir George Campbell and Mr. Cole, and the Home Secretary said that statements had been made by Moran's employer which did not tally with what the prisoner and his friends on his behalf had alleged. He was said to have been idle, and really to have received more in wages a good deal than he had admitted. Mr. Cross, however, added that he was bound to say the magistrates would have acted more wisely had they adjourned the case in order to make further inquiry, and in this way prevented even a seeming miscarriage of justice. He further thought it right that Moran should not undergo the whole term of his imprisonment, but be released shortly. Thus the sentence pronounced did not receive the approval of the Home Secretary. But the magistrates were not satisfied to let their heavy punishment be lightened. Justice tempered by mercy was not to be thought of, and they resolved to do their best to prevent the threatened remission of sentence. The mayor wrote a letter to the Dean of Chester expressing the surprise of the magistrates in special meeting assembled that a member of the cathedral body, in person the precentor, should have been found to take up a position hostile to the civil authorities, and calculated to bring them into contempt before their fellow-citizens, and to have entered into a contention on behalf of a worthless individual who had been deceiving the guardians and imposing on the ratepayers. The Chester Board of Guardians held a special meeting to express sympathy with the magistrates. A long discussion took place, in which some guardians expressed the opinion that the magistrates had dealt leniently rather than severely with the man, and a resolution was arrived at expressing approval of the action taken by the magistrates. The guardians further agreed to tele-

graph their resolution to the Home Office, with an expression of their opinion that if the Home Secretary carried out his intention of reducing the term of imprisonment it would seriously paralyze the action of the Board.

So the matter progressed, but the agitation was still kept up in the columns of the press, and the result of the inquiries made by the correspondent at Chester who from the first supplied the information was as follows:—

"From October 18, after the month's illness, to April 18, Moran is proved by the books to have worked on, making, during the last six weeks, with one exception, during which week he only realized 11s. 9d., his full wage of £1, 4s. 9d., and with a break between the weeks ending December 6 and February 14 of nine weeks, during which interval—the time of the frost which he mentioned before the magistrates—he only made one week of 17s. 9d. Thus his statement of ten weeks' illness and enforced idleness is strictly borne out by the facts, as also his statement of £1 as the average wage earned by him when in work, the short weeks during the term from October 18 to April 18 bringing the full wage down to just that sum. Accordingly his employer's statement that Moran earned a larger sum than he admits he did earn also falls to the ground. With regard to the further allegation that he did not earn so much as he could have done, Mrs. Flynn, Moran's sister-in-law, who maintained him through the severe weather, says that, to her certain knowledge, he never lost a day's work through drink. Though living in Steven Street, Broughton, one of the lowest localities of the city—the Irish quarter, indeed—there is not a single record against him in the police books. She also says that he is a sober, industrious man, and maintains that he has never lost work through misconduct. He has been liable to sudden indisposition, as the presence of varicose veins would naturally suggest; and the neighbours say the part-weeks' work which the master's entries against Moran show are to be attributed to that cause, and that cause alone. An employer who misses the services of one of his men for a day or two is only too apt to attribute it, especially among masons' labourers, a by no means sober and industrious set, to drunkenness." In the end we have heard of the release of Moran one week before his term of imprisonment had expired, and of the subscription made for him and his family attaining the amount of £70.

Now all this case, which we have been at some pains to examine, shows the magistrates of Chester in no very pleasant light. They inflict a sentence deemed too severe by the Home Secretary, as shown by the course he has taken, and then when a clamour has arisen they actually, in order to protect their own dignity, petition the Home Office not to grant any remission. They fear that the action of the Board of Guardians may be paralyzed. Why should it not be paralyzed if by such a process alone justice can be done

and wrong redressed? The opinion of the general public on the decision is significantly shown by the contributions poured into the fund. Nor can we wonder at sympathy felt for the man, though there may be danger in carrying, as Englishmen often do, the compensation far beyond the injury inflicted.

Perhaps in Scotland the Great Unpaid are less conspicuous than the Great Unwashed, but the enormities and eccentricities of the former, even in this part of the United Kingdom, compare unfavourably with those of the latter. Sanitary reform among the Great Unwashed would be both useful and agreeable, but in the Great Unpaid we have to deal with a body of men who in their department do not estimate usefulness sufficiently when compared with authority, nor the art of being agreeable to their fellows when it stands between them and their dignity. What, it may be said, has all this tirade to do with legal questions discussed in a legal journal? Why introduce any reference to our county and burgh magistracy by such a bitter comparison? Well, we hope to justify what we have said, and to show that an unpaid magistracy is an irresponsible curse to the land—bad in Scotland, worse in England, probably worst in Ireland, but certainly calling long and loudly for reform everywhere.

Sweet it may be to the old Indian civilian, or the swaggering masterful ex-storekeeper from the East, to preserve the shadow of his authority, or develop the native meanness of his character, in the judgments pronounced from the bench of some contemptible local court, judgments very possibly as devoid of justice as palpably they are of law. Sweet it may be to the hereditary owner of acres to air his gentle and terrestrial dignity among the farmers, the cottars, and the poor around him; but law is for all men equal, or should be so, and we, as lawyers, rebel against the Great Unpaid. We say, and say boldly, that they are inefficient, that they are incompetent, and, perhaps unconsciously, unjust. Biassed they are, they must be. Chosen from the baser herd by this or that political party, identified in the person of a Lord Lieutenant, or perhaps of a Town Council, their office serves no purpose but that of the pleasing accession of an intangible something to the recipients, and of a very tangible unpleasantness to those subjected to its power.

As to the inefficiency of the magistrates there can be little doubt that, however intelligent some of them are, the great majority know nothing whatever of the duties and responsibilities of their office. It is enough for such men that to be justice of the peace for this county or that is the "correct" thing; they desire the honour, and when the next commission is opened they obtain it. People who have not really thought upon the subject, frequently observe that it is wonderful how well the magistrates do without any judicial training. Some even go so far as to hint that absence of previous training (and we must presume of legal

knowledge too) is of advantage in a judge. A very different view is this from the French, indeed, generally speaking, the Continental system whereby their judges are regularly trained to their work, not, as here or in England, by acquaintance with the storms of the Bar, but floating along their judicial career from the babbling and noise of a Country Court to the wider and stiller depths of a Cour de Cassation. Training, however, or no training, the Justice in England, great man as in his own estimation he may be, generally moves in leading-strings. At Quarter Sessions there is the chairman to guide him, generally a man versed in the law. The justices usually follow their chairman like sheep—woe betide them and their decisions if they do not! When we think of this we wonder more and more that the chairman alone is not retained and salaried to do the work. Then in minor meetings of justices the clerk plays his part. The paid subordinate is the true judge, and might with less mockery sit upon the bench himself. But sometimes the justices think they know best, and in these cases as a rule they are wrong and their servant is right. What a farce the whole thing is! We might quite well afford to laugh at it all, were it not for those occasions on which Quarter Sessions defy their chairman, and justices their clerk. Such occasions are opportunities for injustice, against which we are bound to guard, and nothing can be done with an unpaid man, working perhaps for his own self-glorification, but still working without remuneration. Now if the judge were a paid officer it would be easy to call him to account for any delinquency, and the delinquencies would be very scarce.

Again we find justices, probably because they know no better, displaying a bumptious contempt for the ordinary rules of procedure, and even at times for the ordinary rules of civility. It is not so long ago since we read in the newspapers a story of a gallant magistrate who somewhat forgot his own claims to the title of gentleman in an attack upon a member of the Bar pleading before him. Technical rules of any kind, especially rules of procedure, must appear sometimes stringent and unnecessary to laymen, but that is no reason for regarding them as devices for the evasion of justice. They may be strained, and when they are so the check that is administered should preserve the ordinary rules of courtesy. These rules of procedure are invariably intended not to create delay or waste time, but to protect the fairness of trial, and if possible ensure that justice shall be done in the cause. Justices of the peace, however, in country districts especially, have a class bias. They cannot help it, nor do we find fault with them as men for it, though it forms another argument against their existence as justices. The proprietor of an estate may be quite a professional man in the capacity of landowner, and among the questions arising in a country district he must have many wherein he takes a "professional" interest. We cannot blame him, we blame the system; we object on the ground that the magistrate who is not paid cannot

if he do wrong be hauled over the coals like the magistrate who is —there lies the secret of each fault we see in our justices. The result of the many instances in which cruel, oppressive, or unsatisfactory judgments have been pronounced is to be seen in the expression "Justices' justice," almost in England synonymous with injustice. Here in Scotland the Great Unpaid have not conferred on them such wide powers as in England, but still they are sufficiently ample, and are even now undergoing gradual curtailment. Across the Tweed the power exists of giving sentences in Quarter Sessions even to penal servitude. Thus we have a posse of justices met together gravely to wag their empty heads, while an astute chairman gets to the bottom of the matter, and then directs them all how to vote and what to do. We remember to have seen in the "Greville Memoirs" curious tales of how the House of Lords was wont in times past to be packed by lay Peers when sitting as a court of last resort, in order that Lord Chancellors ambitious of attaining a posthumous fame might see their judgments pronounced in other Courts sustained in the highest. So also, even later, in the same Court, when a quorum was required, dummies in the shape of hereditary but non-legal legislators made their appearance and solemnly assented to the judgment pronounced. But dummies never last long, and these have all been swept away, as we hope the justices at Quarter Sessions will be also.

We venture to think that certain of the powers of a justice of the peace might be usefully retained. Thus that very authority from which he presumably derives his name might be left him, we mean the power of reading the Riot Act as the civil magistrate. Again, for the issue of warrants the signature of some reliable person is useful as a check upon the indiscriminate recklessness occasionally exhibited by the police. Again, it is often of great importance in a district that there should be some person readily accessible before whom the affidavits requisite for drawing pensions and so forth may be taken. In this and in suchlike matters the unpaid magistrates are really most valuable in the public economy. They only transgress our ideas of what is right and what is wrong when they exercise the functions of a judge.

When, for example, a trained lawyer comes to exercise judicial powers, he knows that justice is merciful, and that in the eye of the law a man accused is regarded as innocent until he has been proved guilty. But the justice sits there without any legal training or experience. He sees a wretched-looking being brought before him and accused of some crime, the commission of which his appearance at all events would not belie, and straightway he allows a presumption in favour of guilt to creep into his mind; nor can he be persuaded out of it unless by very clear facts, with most judicious and able argument. This is not quite as it should be.

On the other hand, we are told many things in favour of these unpaid magistrates. In the first place, from a spirit of economy, it

is said, we should cultivate them, because they cost the country so much less for her judicial establishment. We are not sure they save us much, but if they did, the argument should extend further. Why stop short at justices of the peace? why not sweep away all paid judges, and hand over their powers, even unto the disposal of life, to unpaid jurats, as in Jersey? In that happy isle there are twelve jurats who are the sole judges of everything civil and criminal, and who possess the most absolute powers, limited only by an appeal to the Judicial Committee of the Privy Council. They have no Decisions, no Morrison or Shaw or Dunlop troubles the placid slumbers of the Bench or vexes the waking moments of the Bar, all is rule of thumb; and from the senior judge, who until lately was a paralytic and highly impecunious old man, down to the Attorney-General, with his £300 a year, at the head of the Bar, there exists an equal contempt for precedent and the Privy Council. To those who believe in an unpaid magistracy we commend this system as an admirable development of their theory, though jurats very likely are a larger and perhaps a finer crop in the Channel Islands than they might on inquiry prove to be here at home.

Sometimes people patronizingly say of our justices that these are on the whole pretty good. If we are to regard such an admission as our Utopia of Justice we need seek reforms no more. Adieu, Courts of Session Acts, and Tables of Fees, Acts of Sederunt, and Auditors' reports, provided only we get along pretty well on the whole! Lawyers will readily be satisfied on that point, but will the public? Even with justices as they are, the grumbling that goes on is perpetual. No grievance pleases the newspapers better than a justice's blunder, for the best of reasons —none pays them better to ventilate. Now it is a heavy sentence for stealing a turnip out of a field, another time a decision given and judgment pronounced by a magistrate at his own private dwelling. It is always something, because the public feels that here our otherwise strict administration of justice may, and in fact really does, sometimes fail. It has also been urged in favour of the present system that by it you get men who are valuable and influential from local knowledge and connections. We somewhat doubt that in a judge these are advantages, and may point to a decidedly opposite practice in the appointment of paid magistrates, where, without any absolute rule, it is generally usual to avoid local ties.

One point especially we must in conclusion notice, and that is the disadvantage of clerical justices. No beneficed or officiating clergyman of any denomination whatsoever should, we think, be eligible for any office which may render him a judge among his fellow-men. Let them have by all means powers to take affidavits and so forth, but do not give powers beyond. It is sad, but it is true, that clergymen in England on the Bench have shown themselves more violent, less capable of self-control or of discrimination than any other class of justices, and this in itself gives additional force to our remarks.

By the system as it exists we are doing an injustice both to the

justices and to the people, both to the judges and the judged; the former suffer in the estimation of men because they fail to do well that for which they have not been trained, and the latter suffer by the failure. Let us hope that there will be a change ere long.

PROFESSIONAL REMUNERATION OF ARCHITECTS.

THE scale of remuneration of professional men is very variable, and except in regard to the costs of litigation is not subject to audit. Engineers, accountants, and architects have very much the matter in their own hands. They do not charge by time, or by the length of the papers or plans which they produce, but in general according to their own notions of *quantum meruit*, or according to some arbitrary rules known to themselves, and of which their clients or constituents know nothing.

On the present occasion we refer to the subject in order to introduce to the notice of our readers an important decision pronounced by the English Court of Exchequer on the 16th November 1870, in regard to the remuneration of architects. This decision, strangely enough, has been kept out of the regular reports, for reasons which we cannot explain. The report which is now published is taken from the *Times* of 17th November 1870, and forms the subject of a vigorous leading article on that day. The case is referred to in the *Solicitors' Journal* of November 1870 as an important decision, the report of which is promised, but the promise was not kept. The decision should be noted for future use, as disputes upon the matter are not infrequent.

Before, however, giving the judgment, we may state the law in reference to the usual mode in which architects make their charges. Their practice is to charge by way of a commission on the expenditure which their constituent has made in the erection of his castle. This commission is generally fixed at five per cent., but it is increased if five per cent. will not produce a handsome enough fee. In regard to this practice we extract the law as stated in the tenth edition of "Chitty on Contracts," p. 541, as follows:—

> "It is usual for architects and surveyors to charge for their trouble a percentage on the cost of the works with reference to which they are employed. But in *Upsdell* v. *Stewart* (Peake, p. 193), which was an action for work and labour done as a surveyor, and where evidence was offered on behalf of the plaintiff that it was the uniform practice of surveyors to charge £5 per cent. on all money allowed to the workmen, Lord Kenyon was of opinion that such a demand was exorbitant; and he ruled 'that the plaintiff was entitled to a reasonable compensation for his labour, but was not to estimate that by the money laid out by the defendant in finishing his building.' And in a subsequent case, where a surveyor claimed £5 per cent. on the money laid out by the defendant in altering certain buildings, as a remuneration for having superintended such alterations as surveyor, Lord Ellenborough left it to the jury to say 'whether this mode of charging was vicious and unreasonable; and if they thought it was, to deduct accordingly' (*Chapman* v. *De Tastet*, Stark, 294)."

Besides charging commission after this fashion, architects were

also in the habit of insisting that they had a right to the property of the plans and sections of the buildings which were erected under their superintendence, so that the proprietor of the house on taking possession would, in order to ascertain the course of any drain, require to apply to the architect who had carried off the plans. It was this unreasonable demand that the decision of the Court of Exchequer peremptorily rejected. This is the *Times'* report:—

"COURT OF EXCHEQUER, *November* 16, 1870.

("*Sittings in Banco, before the Chief Baron and Barons Bramwell and Pigott.*)

"EBDY *v.* M'GOWAN.

"This case was tried in London before the Lord Chief Baron. The defendant paid into Court a sum of £101, 5s., and the plaintiff obtained a verdict for £97, 12s. beyond that sum, the defendant having leave reserved to move to reduce the verdict by a sum of £60. The case involved the vexed question whether the plans executed by an architect, and for which he is to be paid, are to be retained by him as his property. The plaintiff is an architect and the defendant a clergyman at Homesdale, and the former was asked by the latter to prepare plans and specifications, and get tenders for the erection of a church and vicarage-house. About the work done for the church there was no dispute, although the question was stoutly fought at the trial, and the sole matter now before the Court related to the vicarage-house. The contract between the parties was that if the vicarage was completed the defendant was to receive five per cent. on the money expended. If the tenders were given and the work not commenced, he was to receive three per cent. on the estimated cost; but if the plans only were drawn, and tenders not issued, he was to have two and a half per cent. on the estimated cost of the building. The plans were prepared, but the defendant, for reasons of his own, did not wish the work to proceed, and wrote to the plaintiff asking for his account, which he said he would settle, at the same time requesting that the plans might be sent to him. The plaintiff sent in his claim for the work and labour of preparing the plans, but declined to let the defendant have them, saying that they belonged to him. The defendant declined to pay without having the plans, and hence the action. Mr. Aspinall, Q.C., in pursuance of leave reserved, moved to reduce the verdict by a sum of £97, 12s., or such sum as the Court should determine, on the ground that the plaintiff was not entitled to recover in respect of the parsonage-house without delivering or being ready to deliver to the defendant the plans, estimates, and other papers which were the result of his employment by the defendant.

"Mr. Digby Seymour, Q.C., and Mr. Gainsford Bruce now showed cause against the rule; and Mr. Aspinall, Q.C., and Mr. John Edge supported it.

"The plaintiff at the trial set up the usage or custom of the Society of Architects not to deliver up plans, and called evidence in support of it. The defendant called a very eminent architect, Mr. Smirke, who swore that there was no such usage or custom, but the jury found in favour of the plaintiff. At the close of the arguments their Lordships said that the leave to move related only to a sum of £60, and in the interests of the parties suggested that some arrangement had better be arrived at between them as to the difference between that sum and the sum of £97, 12s., and eventually it was agreed that the £37, 12s. should be reduced to £21, and the Court deal with the motion in accordance with the terms of the leave reserved.

"*The Lord Chief Baron*, in the course of his judgment, said that the defendant had employed the plaintiff as an architect to build a vicarage-house, and he was to act as such in relation to that building, and do the necessary work included in such employment. The plaintiff accepted the employment, and prepared plans and specifications, and solicited tenders for the work. While

the work was proceeding, the defendant put an end to the plaintiff's employment of architect, and requested him to send in his account, and required that the plans and specifications might also be sent to him. The plaintiff wrote to say that he would send in his account, but would not deliver the plans, as he intended keeping them. Looking at the original contract between the parties, there was no stipulation either one way or the other as to the plans, either that the defendant was to have them, or that the plaintiff should retain them. Nothing was stated about them at all, except an objection to hand them over to the defendant. The only question between the parties seemed to be whether, though not expressed, if it was a provision of the contract that in the event of the employment of the plaintiff being stopped by the defendant, the plaintiff was entitled to retain the plans. If there was no such provision, the plaintiff had no right to retain them; if there was such a provision or stipulation, then he would have. The plaintiff gave evidence of a custom or usage among architects that, in the event of the employment of an architect being stopped, he was entitled to be paid for the plans and retain them. Then came the question of fact, was there any such usage as the evidence for the plaintiff said existed? His Lordship was not prepared to express an opinion on the evidence as it stood; but, supposing such a custom or usage to exist, then came the question, was it a reasonable one? He thought it was not. No such right as that set up by the plaintiff, viz. to retain the plans, existed, unless there was an express stipulation in the contract between the parties to that effect, and he could not accept the suggestion which had been urged upon the Court on the behalf of the plaintiff that such a stipulation was, by implication, a part of the contract. It appeared contrary to reason, good sense, and justice that in the event of a contract being put an end to, the architect should retain the plan for which he was entitled to be paid; it would require at least a clearly expressed stipulation in the contract to enable him to do so. The defendant was perfectly justified in refusing to pay until he had the plans. The execution of and the plans themselves formed the work and labour for which he charged the defendant, who was entitled to them if he had to pay for them. The rule, therefore, to reduce the verdict by the sum of £60 would be made absolute.

"*Baron Bramwell* agreed with the Lord Chief Baron, and stated that the question could not be said to be one governing the future, because parties to contract might make their own bargains. The real contract between the parties was that the plaintiff was to receive two and a half per cent. for the preparation of the plans upon the estimated cost of the building, and the three per cent. and five per cent. were contingent engagements after the preparation of the plans. The defendant had a right to say that he discontinued the plaintiff's employment or would stop it at the preparation of the plans. The defendant had a right to the benefit of the plaintiff's work before he paid for it. His Lordship continued that he entertained a very high opinion of architects as a body; they were a very intelligent, high-minded, and useful body of men, and he wished to say nothing in disparagement of them, but was there such a usage as had been set up by the plaintiff, and which some architects had sworn existed? In his Lordship's judgment the usage contended for was impossible; he could not help saying that it was perfectly suicidal; so soon as it was brought into being it cut its throat with its own absurdity. Suppose an attorney to be employed to conduct a suit, and his client deemed it expedient to put an end to the suit and his attorney's employment at the same time, and paid the attorney his costs whatever they were, had the attorney a right to say that he would not deliver up the pleas, as they might be demurred to, and he would lose the costs of opposing the demurrer? If the work be carried on to a certain point, and not further, in all common sense a man is entitled to what he is compelled to pay for. Before usage could be insisted upon it must be proved to be one well known to prevail. It required the most rigid proof that it actually existed. It was very well for some two or three gentlemen to say that there was such a usage, but he (the learned Baron) would like to see the public in the box, and hear what they had to say

about it. Mr. Smirke, the architect, had stated there was no such usage as the plaintiff had set up. His Lordship concluded by saying that he was clearly of opinion that there was no such usage, and that the defendant was entitled to the plans. If the defendant did not get them he was paying for no benefit whatever.

"*Baron Pigott* concurred with their Lordships, saying that, looking at the contract between the parties, the question was free from all doubt.

"The rule was made absolute to reduce the verdict by a sum of £60, the form of the rule to be drawn up to be settled by the Court."

BREACH OF PROMISE OF MARRIAGE.

THE success of Mr. Herschell's motion in the House of Commons relating to the subject of actions for breach of promise to marry is in some respects surprising. It was the movement of a private member—certainly novel in its object. A whole string of honourable gentlemen rose one after the other to denounce it, including the Solicitor-General himself, who protested against it, and yet nevertheless it was carried by what may be fairly called a large majority. Surely the House of Commons might have been expected to view with jealousy any attempt to limit the right which an English subject at present enjoys, of telling to a jury the story of his wrongs and claiming their assistance. Can the explanation lie in the fact that in such actions the jury have to listen to a tale of *her*, not *his*, wrongs? The House of Commons is as yet composed of only those who are the representatives of men, and men are the defendants, not the plaintiffs, in cases of this sort. A well-known Scottish case in which this position of matters was reversed only proves the rule by way of exception. We can imagine the supporters of female suffrage pointing with triumph to Mr. Herschell's majority as showing the necessity for the reform they demand, and indeed it may be questioned whether that gentleman could have been so bold had he known that he had an enraged female constituency to face.

The House of Commons is now committed to the opinion that "the action for breach of promise of marriage ought to be abolished except in cases where actual pecuniary loss has been incurred by reason of the promise, the damages being limited to such pecuniary loss." The debate seems to have been an interesting one, and forcible arguments used upon both sides. Although perhaps not a general rule, it may often happen, as pointed out by Mr. Herschell, that the damages given are in the inverse ratio to the real merits of the case. On the other hand, might injustice not be done if pecuniary loss alone were to be looked to? The real objection to this resolution seems to be that it is an attempt to regulate by Act of Parliament what has always been considered a jury question, depending upon the special circumstances of each case which comes up for decision. According to Sir Henry James, however, who

supported the resolution, an action for breach of promise is really an anomaly in the law of England, seeing that it is based upon the recognition of the claim of wounded feelings for solatium. That learned gentleman points out a distinction between the law of England and that of Scotland in this respect, seeing that the law of the latter country has respect to wounded feelings.

But the law of Scotland seems upon this point to have gradually altered. Erskine says (I. vi. 3), "By the custom of Scotland all promises of marriage, whether private or more solemn, contained in written contracts may in the general case be resiled from, which proceeds from our close adherence to the rule *matrimonia debent esse libera*, and from the consideration of the fatal consequences which often attend forced marriages. But if we suppose matters not entire, that is, anything done in consequence of the promise, whereby damage arises to any of the parties from the non-performance, the party refusing to fulfil, though he cannot be compelled to celebrate the marriage, may be condemned to pay the damage sustained by the other party." Thus this eminent authority gives no countenance to an action of damages based upon the mere fact that a promise to marry has been broken. We must suppose "matters not entire," and "something done in consequence of the promise," which is to be the foundation of the claim for damage. His view is precisely that which will be given effect to if Mr. Herschell's resolution develops into a statute. But it is evident from the decisions that the law became more and more liberal towards the unfortunate pursuers of such actions. This is perhaps singular when we remember that only in comparatively recent times did such cases come before juries. But before the Jury Court became one of our institutions, the hearts of our stern "Lords" had been touched, and in determining the actual loss they gave something over and above by way of consoling wounded feelings, and at last wounded feelings alone were held sufficient to warrant a decree for even substantial damages.

The earliest decision, one which is characterized by the reporter (Fountainhall) as "equitable, though it be new," is that of *Grahame & Erskine* v. *Burn* (January 2, 1685, M. 8472), where a woman pursued her unfaithful lover "at least for damage and interest in so far as she was put to expense in entertaining his friends, and taking off bridal cloaths." The case is reported under the heading *Locus pœnitentiæ*, and the Court were careful to find that *matrimonia debent esse libera*, and that there was *locus pœnitentiæ*; but they admitted her expense to probation, and although the expense proved seems to have amounted only to £80 Scots, they took into consideration "her loss of the market," and modified £100 against the defender "in regard especially that he could give no rational ground why he gave over the bargain." This decision, however, it will be observed, did not raise the question pure and simple whether damages were due for merely

outraged feelings. And in the later case of *Johnston* v. *Pasley* (December 21, 1770, M. 13916) it is reported that some of the Judges were clear that "no action could be sustained in this country for the breach of a simple promise, unless something had intervened, such as bespeaking clothes, etc., in expectation of the marriage." But in *Hogg* v. *Gow* (May 27, 1812, F. C.) the question raised in the recent Parliamentary debate came fairly before the Court, and was fully argued and carefully considered. The defender Gow had refused to implement his promise of marriage, "but with many compliments to the pursuer's character and conduct," which, however, did not cause her to desist from an action of damages, held relevant by the Lord Ordinary, who assured the damages at £500. A second Lord Ordinary restricted them to £300, and then the case came before the Inner House by the appeals of both parties. The defender made a vigorous attempt to have the old law of Scotland recognised. Founding his argument upon the admitted legal principle that there is no contract by which, *rebus integris*, either of the parties can be compelled to solemnize a marriage, he maintained that the principle of legation cannot be null and void, and yet the accessory be made the ground of an action. The authorities were certainly on his side, and he could with much force argue that there was no instance of any such action having been sustained excepting where there was fraud or actual pecuniary loss. The pursuer also founded upon the fact that one cannot be compelled to implement a contract or promise of marriage, but urged that fact as the strongest reason why he should be subjected in damages for his refusal. Further, it was argued that no distinction had been pointed out between pecuniary loss and bodily injury or the loss of reputation. That mental injuries admit of reparation was rendered clear by the numerous decisions in questions of defamation. The decision was not unanimous. Lord Craigie represented what appears to have been the former view taken by our Judges in such cases, and that which Mr. Herschell desires to see given effect to again. His four brethren were, however, of a different opinion. Lord Meadowbank said, "I do not understand the principle on which it can be said that there has been no wrong done, or that a breach of promise of marriage is a wrong of such a kind that no damages are due on account of it. Is it no wrong to inflict perhaps the severest distress that the human mind can suffer? And if it is, is the party injured not entitled to redress?" Referring to the expression used in the old case of Grahame, "loss of the market," he gives this explanation of its meaning, "How does she lose market? Why, she loses it because she is not disposed herself to fall soon in love again. Her heart is used; it is worn; she is less attractive to others. A person of any kind of worth of character that has suffered the calamity of being tricked by a male jilt is very little disposed for some time to listen to courtship; she is rendered incapable of it."

Waxing eloquent, he goes on to say, "Are we at this time of day, in the commencement of this century, to find that we are still in the midst of barbarism; that we are still so blind to the worst of injuries, to the greatest of wrongs, that we are not to give redress? I think that the authorities are all in favour of this lady, not one of them is against her. It is not a wrong that can be made up by implement, because marriage must be free. We won't compel a man to marry, but we will redress this great injury that the party has sustained." Had his Lordship been able to look forward to the old age of the century, he would have found a large majority of the House of Commons returning to what was in his opinion "the midst of barbarism." Lord Bannatyne said, "Formerly this would have been a very difficult question in this country. Our early lawyers seem to have made a mistake on the subject in point of principle. Marriage should be free; but it does not follow that if one of the parties leads the other to entertain hopes which are disappointed, and hurt the mind beyond all computation, that he shall not be obliged to repair the damage." The result was that the gallant Inner House awarded the large sum of £700.

It will be thus seen that the alteration of the law proposed by Mr. Herschell would, in so far as Scotland is concerned, be in a retrograde direction. Gradually, and in days when men held fast by precedents, our Judges came, upon what they believed to be principles of equity, to take that view of actions for breach of promise which Mr. Herschell now maintains is so grievous and unjust. Shall we go back? Shall we refuse to recognise that as just which even old Lord Fountainhall, although startled by its novelty, welcomed as in accordance with equity? The subject at least deserves grave consideration. No doubt the law as at present administered may sometimes cause hardship, and if the resolution of the House of Commons has the effect of causing judges and juries to weigh more closely the merits of each case, it will do good. But great difficulties must attend any attempt to legislate in the direction indicated by Mr. Herschell and Sir Henry James.

THE CASE OF EDMUND GALLEY.

It is impossible to read the letter of the Lord Chief-Justice of England on the case of Edmund Galley without being impressed with the truth of the oft-repeated apothegm that "truth is stranger than fiction." A novelist who represented a man being sentenced to death on such evidence as was produced against Edmund Galley, or being doomed to transportation for life despite such evidence of innocence as was adduced for Edmund Galley, would be rebuked by the critics for violating the rule not to allow exaggeration to go beyond the bounds of possibility. The reader of the letter must

also be impressed by beholding an eminent judge, a judge holding the exalted office of Lord Chief-Justice of England, appearing as an advocate, and earnestly pleading for justice to an injured man. Much that Sir A. E. Cockburn has said and written will live, and be freshly remembered, and assuredly his memorial on behalf of Edmund Galley will not be forgotten. It is forty-three years since his Lordship, then a young barrister, heard the trial. He was not professionally concerned in it, but he followed the details "with profound interest;" and he adds: "The trial left a very painful impression on my mind, which has never been removed."

In July 1835 a farmer named May was murdered on his way home from Moretonhampstead fair. Some months afterwards, Oliver, who belonged to a gang of thieves, was sentenced to transportation; and, whilst in Dorchester gaol awaiting removal under his sentence, recited his exploits to a fellow-prisoner; and, amongst other things, he stated that he had murdered May in conjunction with a man known as Dick Turpin. The fellow-prisoner told the governor of the gaol what he had heard; Oliver was sent into Devonshire for examination, and was committed for trial. Who was the accomplice? It happened that Galley, a native of Kent, who had no connection with the West of England, a man of loose habits who attended fairs, and who bore the name of Turpin, was in a London prison on a charge of vagrancy. He was sent to Devonshire, and at the Devon summer assizes in 1836 he with Oliver was tried for the murder of May. What was the evidence for the prosecution? A man named Avery who had been the apprentice of May, and a woman named Harris, with whom he cohabited, who were tramps, and known as thieves and dangerous characters, were at that time in Exeter prison under sentence of transportation. Avery and Harris had been arrested on the suspicion of having murdered May; but, after being detained a month, they were released. Harris told the governor of the Exeter prison that she had seen the murder committed, and could identify the parties. She received a pardon; for at that time a person convicted of felony, as Harris was, could not give evidence unless the effect of the conviction had been got rid of by a pardon from the Crown—a rule which may be fairly described as a law for the encouragement of the practice of perjury. We quote the summary of her evidence from the Lord Chief-Justice's letter: "She said she had been with Avery at Moretonhampstead fair. On the day the murder was committed she had had a quarrel with him, and in consequence started by herself in the evening on foot on her way to Exeter, intending to overtake the carrier's cart, which had already left for that place; but, failing to overtake it, she turned back to return to Moretonhampstead. When a mile or two from the town she met Buckingham Joe and Turpin walking hastily in the opposite direction. Presently afterwards she met the farmer riding quietly along on horseback in the same direction as the men;

whereupon, suspecting that they had gone on with the intention of waylaying him, she determined to watch them, which she was enabled to do by getting inside a hedge which lined the road along which they were going, and which concealed her from them, though she could see through it what they were about, or by getting into the shadow of the hedge, as it was then getting dark—I forget exactly which. When the farmer had advanced a short distance the two men rushed out upon him from the ditch in which they had concealed themselves, knocked him off his horse, beat him with their sticks till he was senseless, then plundered him, and left him for dead on the spot. Having witnessed the transaction she returned to Moretonhampstead and there rejoined Avery. Upon the two men then in prison being shown to her, Harris identified both as the men by whom the murder had been committed. Oliver she recognised unhesitatingly, saying it was Buckingham Joe, the highwayman. Galley, she said, was Turpin, but observed that he was much altered." About this witness Sir A. Cockburn says: "She was notoriously a woman of infamous character. She had an undeniable motive for fixing the prisoners with the guilt. She thereby freed her own paramour from the suspicion which hung over him, and she obtained a remission of her own sentence, which I cannot but think she had been led to expect, though she denied such to have been the case. She had been, as I have stated, pardoned previously to the trial." Why, we may well ask, should she suspect foul play? What was her motive in watching the proceedings of the men? If her motive had been criminal, she would have claimed a share of the plunder. She and her paramour were arrested, and for a month were in peril of being indicted for the murder. Would she not, during that time, have given information as to the actual perpetrators of the crime? Here we have a story too improbable to be credible told by a woman of infamous character, who had strong motives for perjury. The only other evidence against Galley was as to identity. Sir A. Cockburn says: "Several witnesses swore to have seen Oliver and Galley at the fair, and, misled, as it turned out in the sequel, by Galley being known by the name of Turpin, rashly swore to his identity as confidently as they did to that of Oliver. But these witnesses admitted that they had never seen Galley previously to seeing him at the fair, and a year had elapsed between that time and that of his apprehension, when their attention was called to him. One intelligent witness, however, a woman named Clark, formed an exception to the rest; for while she spoke positively as to Oliver, she denied as positively that Galley had been the other man. As a reason for denying his identity she particularly stated, as did Oliver afterwards, that the associate of Oliver had good teeth, which Galley had not." The woman Harris, with the cunning of such criminals, had, in order to prepare for the breakdown of the case against a man whom she had never seen, said that Galley was much altered. Galley, who

was not defended by counsel, appeared astounded and bewildered, and remonstrated angrily with the witnesses, and broke out into most emphatic and passionate protestations of innocence. Both prisoners were convicted. Sir A. Cockburn says: "Being asked, in the usual form, what they had to say why sentence of death should not be passed? Galley broke out into the most vehement protestations of innocence. Oliver, a tall, handsome fellow, drew himself up and said, with the utmost calmness and composure, 'I have nothing to say for myself, except that it was not I that killed the man'—meaning, no doubt, that it was not his hand that gave the deathblow—'but,' he added, 'my Lord, you are not going to send an innocent man to'—I thought he said 'death;' some say he said to 'trap,' a cant term for the gallows—it matters very little which. Then, looking down, as I well remember, as if between pity and scorn: 'My Lord, do you think, if I was going out to do a deed like that, I should take a weak little fellow like this for my companion? I should know better than that. My Lord, this man had nothing to do with it; he is innocent.' The scene created a sensation, which it would be difficult to describe, and which left an impression not to be effaced." The last words of Oliver at his execution were: "I say in the face of this congregation I am guilty, but the other man is innocent." If this were the whole of the case we should be justified in saying that Galley was wrongfully convicted, and that he ought to have had the pardon of the Crown. But it happens that there is proof of the innocence of Galley.

We may here remark that before his execution Oliver stated that his accomplice was a man named Longley, who also went by the name of Turpin; and Galley says that Longley is still living in the colony. But the proof of Galley's innocence does not depend upon the statements of Oliver. We will cite the terse and lucid account given by Sir A. Cockburn of the *alibi*. When Galley recovered from his bewilderment, "he stated that he remembered having been at Dartford fair in Kent about the time of the murder; that a row had occurred at the fair, and that the stall of a seller of nuts and the like had been overturned, when he (Galley) had helped to pick up the nuts for the man; that he had had a dispute there with another man about a wager for half-a-crown, and that they agreed to fight for the money, and did so, when he (Galley) was beaten, and had to give up his claim to the half-crown; but that, having got the man to bet with him again upon some matter connected with cards, he, by some card-sharping trick with which the other was unacquainted, won the half-crown back. A gentleman of the name of Cherer, now no more, who attended the Western Circuit as shorthand writer—a gentleman of attainments and ability—and who had been present throughout the trial, and had carried away from it the conviction of Galley's innocence, having been made acquainted with the man's statements, determined to leave the circuit and go into Kent for the purpose of ascertaining

whether these statements were true. A subscription was thereupon raised by several members of the Bar, equally impressed with a belief of Galley's innocence, to defray his expenses. Mr. Cherer went into Kent. He found out the persons referred to by Galley, and who substantially verified Galley's statement. And it turned out that *the day on which the circumstances referred to by him had occurred was the very day on which the murder had taken place.* It was, therefore, impossible that Galley could have been a party to the murder, far away in a remote part of Devon. Moreover, it became clear, from the man's past life, that he belonged to a different part of the country, and never had had anything to do with the West of England gang of tramps and thieves. Having ascertained these facts, Mr. Cherer applied to the Home Office, with extreme urgency, and induced the then Secretary of State to cause inquiries to be instituted. Sir Frederick Roe, then the chief magistrate at Bow Street, was deputed by the Home Secretary to go down into Kent to inquire into the facts stated by Galley. Sir Frederick Roe can no longer be called to bear witness to the truth; but there is a living witness of the highest authority, who can testify to the result. Sir Montague Smith, who had defended Oliver, while satisfied—as he could not but be—of the guilt of his own client, was equally persuaded of the innocence of Galley, and interested himself on his behalf; and, on learning from Sir Frederick Roe that he was going into Kent to inquire into the truth of Galley's statements, actually accompanied him, and sat by his side during the investigation. I have his authority for saying that both he and Sir Frederick Roe were thoroughly satisfied, as the result of the inquiry, of the truth of Galley's statement, and that the *alibi* was completely established. It appears that Sir Frederick Roe reported to this effect to the Home Office; and the result was that Galley was reprieved." Galley was reprieved; but, instead of receiving a pardon, his sentence was commuted into one of transportation for life; and the man, "of whose innocence no reasonable doubt could be entertained, has passed nearly half a century as a convict felon." The Lord Chief-Justice remarks that, in this case, there could be no question of degrees of guilt; that he knows not on what ground the strange proceeding of the Home Office was based; and adds: "I can with truth say I have never thought of it without a deep sense of the flagrant injustice of such a decision." Galley, by his good conduct, has obtained some amelioration of his hardship. He is no longer working as a slave on the public roads, but is assigned to a master for ordinary service. He desires, before he dies, to have the stigma of murder and felony wiped out by her Majesty's pardon; and, under a strong and imperious sense of duty, the Lord Chief-Justice anxiously presses the case upon the attention of the Home Secretary, that justice and right, however tardily, may be done to an injured man. Sir Montague Smith entirely concurs with Sir A. E. Cockburn. The reply of the Home Office seems to us to be not the

least remarkable part of this strange and painful case. Former Home Secretaries have declined to reopen the case, and Mr. Cross cannot take upon himself the responsibility of overruling them. When justice and official etiquette come into collision, justice must go to the wall. Edmund Galley will not have the justice for which he asks; but hereafter if any one dares to point the finger of scorn at him, or if, when he is dead, any one dares to tell his children that their father was a murderer, it will be sufficient to produce the letter of the Lord Chief-Justice of England. Despite the refusal of the Home Office to interfere, the Lord Chief-Justice has not pleaded in vain for justice, for his memorial has established the innocence of Edmund Galley.—*Law Journal.*

CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR.

(*From the Solicitors' Journal.*)

THE decision in the recent case of *Davey* v. *Shannon* (L. R. 4 Ex. D. 81) appears to us to be something more than doubtful; it seems to be contrary to the current of authority. The statement of claim alleged that the defendant entered into the plaintiff's employment as a foreman tailor for three years, on the terms that if he should leave the plaintiff he should not engage in the service of any one carrying on, or himself carry on, the business of a tailor within five miles of D.; and that, on the expiration of three years, he continued in the plaintiff's employment on the like terms, except as to the period of employment, till 1877. Breach—that in 1877 the defendant left the plaintiff and carried on business as a tailor in D. The statement of defence alleged that the contract was not in writing, as required by the 4th section of the Statute of Frauds. It was held, on demurrer, by Hawkins, J., that, treating the contract as a new contract of employment for an indefinite period after the expiration of the three years, the stipulation as to not carrying on business amounted to an agreement not to set up the trade during the joint lives of the defendant and the plaintiff, and was, therefore, *primâ facie* not to be performed within a year, and therefore fell within section 4 of the Statute of Frauds.

There is one decision which certainly is an authority for the view taken by Hawkins, J., but it is not one which is entitled to much weight. The decision to which we refer is *Eley* v. *The Positive Assurance Company* (24 W. R. 252, L. R. 1 Ex. D. 20). There was in that case an alleged contract to employ a solicitor for life, subject to a power to dismiss him for misconduct, and it was held in the Exchequer Division that this contract was within the 4th section of the Statute of Frauds, as being a contract not to be performed within a year. The case went to the Court of Appeal (24 W. R. 338), but that Court being of opinion that there was no

contract in fact, the point as to the Statute of Frauds was not dealt with. The general effect of the decisions is that, to be within the statute, the contract must be not to be performed within the year, in the sense that the parties have contracted with reference to a period either expressly exceeding a year or so far ascertained as that it must exceed a year. If the period fixed for performance of the contract is an unascertained period which may or may not exceed a year, the contract is not within the statute. The probability that the period of performance may, in fact, exceed a year is immaterial, if in any contingency the period agreed upon may not exceed a year. The statute is not to be construed as meaning that it is applicable unless the contract is to be performed within the year.

The leading case on this subject is, of course, *Peters* v. *Compton* (1 Sm. L. C. 5th ed. 283). The marginal note in that case states the law to be that an agreement to be within the statute must be an agreement that appears from its terms to be incapable of performance within the year. We rather doubt whether, construed strictly, this proposition represents the effect of the cases, because it seems possible that a contract capable of being performed within a year may, nevertheless, be within the statute. Many contracts in which the time fixed for performance exceeds a year might be capable of performance within a year. Looking, however, to the case of *Peters* v. *Compton* itself, we find the principle clearly laid down that, when the agreement is to be performed upon a contingency and it does not appear within the agreement that it is to be performed after the year, then a note in writing is not necessary, for the contingency might happen within the year; but when it appears by the whole tenor of the agreement that it is to be performed after the year, then a note is necessary. The principle thus laid down has been followed in numerous decisions, and it seems to us inconsistent with the decision on which we are commenting. It is unnecessary to refer at length to these decisions, but we may mention the somewhat quaint promise to pay a guinea a day as long as Napoleon Bonaparte shall live, as an example of a promise not within the statute.

We should observe, however, that it has been held, on the other hand, that, when the ascertained period of performance is a period exceeding one year, the fact that a certain contingency may operate as a defeasance of the contract does not prevent the statute from applying, as in the case of *Birch* v. *Earl of Liverpool* (9 B. & C. 392), where there was a contract for hire of a carriage for five years, which, by the custom of trade, was determinable at any time on payment of a year's hire. The decision in *Eley* v. *The Positive Assurance Company* appears in the Exchequer Division to have been based by Kelly, C. B., upon this class of cases, but it does not seem to us that they have any application to the circumstances of that case or of the case we are now discussing. A con-

tract for the life of one person or the joint lives of two persons is a contract for an unascertained period, which may last a day or many years. No period exceeding a year is agreed upon. The decision in *Davey* v. *Shannon* must, if the thing is reasoned out, be put on a presumption that a human life will last for a period exceeding a year—a presumption to which we will presently refer. It is insufficient to say that the parties probably expected that the contract would, in fact, be for a period exceeding a year. That is to introduce a very loose and uncertain element into the question whether a contract is within the statute. In many of the cases held not to be within the statute the parties may have expected the performance of the contract to extend over a period exceeding a year. It may be that parties contract on the calculation that the performance of the contract will extend over more than a year. But we have always supposed that, looking to the decisions on the subject, this was insufficient to bring the case within the statute, unless the parties had actually contracted with reference to a period exceeding a year.

It is obviously impossible to settle these questions entirely by the light of substantial considerations of expediency and good sense. The Statute of Frauds is in some of its provisions a very crudely conceived piece of legislation, and has led to divers confusions and anomalies. There is clearly no reasonable distinction in respect of the probability of frauds and perjuries between many contracts that would be within and many that would be without the statute. Two Irish cases cited in the argument of *Davey* v. *Shannon* illustrate this. In *Farrington* v. *Donohoe* (Ir. Rep. 1 C. L. 675) a promise to support a child till she should be able to support herself was held to be within the statute. It seems to us that this decision, if correct, comes within the class of cases where a contract is *primâ facie* to last for a period exceeding a year, though it may be subject to be defeated by the happening of some contingency. A child will not be able to support itself at six years of age. In *Murphy* v. *O'Sullivan* (Ir. Rep. 1 C. L. 679) it was held by the Court of Error that a contract to maintain a child during his life was not within the statute. The result may be put so as to look rather absurd. A contract to maintain a person for his whole life is not within the statute. A contract to maintain a person for a part of his life, exceeding a year, is within the statute. If, however, the matter be considered carefully, the absurdity lies rather in the provisions of the statute than in the decisions. If a restriction of the nature contemplated by the statute was desirable at all, it ought to have included all contracts which may last beyond a year as well as those which are expressly framed with reference to a period exceeding a year; otherwise you must have the absurdity of a contract being within the statute which will probably last a much shorter period than another contract which is without the statute. But it being impossible to dispose of these matters without causing some amount

of absurdity, the tendency of the decisions on the Statute of Frauds seems to us always to have been to construe it with as much strictness as possible, as interfering with natural freedom of contract. It may be useful generally as tending to enforce the practice of contracting in writing, but in the particular instance, if possible, its operation is to be confined by the strictest construction of language. Therefore, the reason of the thing is often a very unsafe guide in dealing with the construction of such a statute.

Now, if the fact that a contract may, and in the ordinary course of things probably will, endure, and more than that is contemplated by the parties as likely to endure more than a year—if this will not bring a case within the statute, the decision in *Davey* v. *Shannon* must be put on a legal presumption of the length of human life. There is no doubt generally a presumption that if a person has not been heard of for seven years he is dead, but there is no legal presumption arising from that state of circumstances as to the time at which he died. We do not think there is any legal presumption as to the length of life. It is impossible there should be. It would be obviously impossible to apply actuarial calculations to any particular life for legal purposes, for they deal with an average of lives without regard to individual circumstances. It is conceivable that a jury, under some circumstances, might be guided by the tables in estimating the probability of the duration of a particular life, even though the doctrine of averages might not be so strictly applicable as in the case of life insurance; but it is impossible to suggest that there is any legal presumption by virtue of which you could read into a contract for a life an ascertained term of years.

Before leaving this subject we cannot help calling attention to a very striking instance of the manner in which authorities come by a sort of traditional process to be cited for propositions which they by no means bear out. One case which the learned judge cites in *Davey* v. *Shannon*, and which, as cited, seems to be an authority in favour of his decision, is *Sweet* v. *Lee* (3 M. & G. 452). That case, no doubt, as abstracted in the head-note, and sometimes in the text-books, is an authority for the proposition that a contract to pay an annuity for life is within the statute, but when the case itself is looked at it is absolutely no authority for any such proposition. The contract was actually to pay £80 per annum for five years, commencing Michaelmas 1828, and £60 per annum for the remainder of the defendant's life if he survived the five years. This is clearly within the statute, without going into any question as to the duration of human life. The judgment gives no reasons, and in the observations made by the judges during the argument there is absolutely nothing to give any ground for the statement of the effect of the case in the head-note. We have here an instance of the mischief that may be done by bad reporting and by the innocent writers of text-books who assume that the head-note always correctly represents the judgment.

Correspondence.

SUGGESTION FOR A SCOTS LAW INSURANCE COMPANY.

(To the Editor of the Journal of Jurisprudence.)

SIR,—Referring to my previous communication on this subject, and to the observations which you have kindly made upon it, I am much pleased to think that you regard the suggestion with favour, and as not unlikely to bear fruit.

It is admitted that the present is by no means a suitable time for the formation of a new company, and that it would not perhaps be prudent to attempt it during the existing depression; but I venture to hope that the matter will not be lost sight of, and will be taken up when circumstances are more favourable. No doubt the members of the profession in Scotland form a considerably smaller body than they do in England, but notwithstanding this the Scottish body, it is thought, is at the present day sufficiently large and influential for the purpose recommended. From the Inland Revenue returns it appears that the number of certificated practitioners in Scotland is about 2000, and if even one-fourth (fairly distributed) were giving a company their countenance and support, great results might be expected to follow, with the co-operation and assistance of outside agents, who might in any case be counted upon being got. It can hardly be doubted that a Scottish legal proprietary company would command the confidence and patronage of the profession, when it is the case that there are at least six English companies of the same sort—all in a flourishing condition, and for the most part doing business in Scotland.

The English and Scottish Law Life Association, which you have been pleased to mention, and which has, like most offices, a good legal connection, is however not a concern of the kind pointed at, inasmuch as the holding of shares in it is not restricted to members of the profession, and it cannot be said to be a legal proprietary office, as its name would seem to imply. It is, moreover, a life office only, while it is thought that any new company, in addition to the life branch, would best consult its own interest and find it advantageous to take up and develop fire insurance, in which department a sound and remunerative business could without doubt be done.

The amount of insurable property, it is almost needless to say, is great and increasing, and the opportunities that law agents have of getting even a choice class of risks are many, and would be largely taken advantage of by those connected with a company of the kind, in the knowledge that besides being agents they were partners in the business. It has long been known that fire and

life insurance when prudently and carefully conducted is one of the safest and most remunerative of businesses; and that lawyers understand and know how to manage this sort of thing has been very clearly demonstrated by the uniform success of the English companies referred to. In the administration of the Law Life Office, for instance, where the directors have about six millions of assets to find investments for, it is something to be able to say, as can be said, that they have never lost a shilling of their funds by a bad investment; and that in regard to safety and stability, only two offices—both of older standing—exceed it in the number of premiums in hand to meet liabilities as represented by existing assets.

The Law Union Insurance Company of London, mentioned in my previous letter, is doing remarkably well, and has recently declared a dividend of 20 per cent. Shares in a concern of this sort form a most eligible investment, and are not affected in the slightest by any panic or depression such as presently exists. The annexed statement, taken from the *Times* and now being advertised, of the progress and financial position of this company, is well worth consideration, and is more to the point than any amount of writing or recommendation. That strong reasons exist for believing success would attend the company suggested, and that there is a fine field for the occupying, is very apparent; but it remains to be seen if it is to be taken advantage of. From the statement referred to it will be noticed what the Law Union has accomplished in a short time in a field that was—in the life department at all events—well filled before it began operations. The prospect of having one's capital increased about 300 per cent. in twenty years or so, and of getting good dividends all along, is most attractive, and such a state of matters is by no means unlikely to result from the formation of a Scottish Company on the lines of the Law Union.—I am, etc., A WOULD-BE SHAREHOLDER.

LAW UNION FIRE AND LIFE INSURANCE COMPANY,

126 CHANCERY LANE, LONDON.

Progress of the Company from its establishment in the year 1854.

Year.	Fire Premium Revenue.	Life Premium Revenue.	Revenue from Interest.	Total Accumulations.
1855	£3,168	£7,126	£1,318	£44,707
1857	4,071	10,716	2,488	62,020
1860	6,332	17,140	3,189	76,828
1863	9,337	27,036	5,170	126,790
1866	21,204	36,682	8,762	187,820
1869	22,302	49,821	11,912	282,288
1872	26,104	57,802	16,388	363,566
1875	32,264	65,856	20,326	449,300
1878	37,855	74,531	25,984	572,073

FIXITY OF TENURE.

SIR,—In his recent letter to the *Journal of Jurisprudence* Professor Lorimer states a number of objections to the present system of leases in Scotland, which he regards as injurious to the interests of the landlord, the farmer, and the country. He considers leases, whatever their endurance, even though extending to 999 years, open to the same objections, though, of course, in varying degree. Want of permanency of tenure, he says, turns skill and capital away from agriculture, and ruins, degrades, and demoralizes the Scottish farmer. These are strong charges, and, if supported by facts, would render imperative some change in so disastrous a system, though, as will be afterwards pointed out, the alternative proposed is open to too serious objections to make it an efficient remedy. The first question, however, is, whether the facts alleged really exist. Now, so far from capital being turned away from agriculture in Scotland, there is no business or trade in which capital is so readily invested, notwithstanding the smallness and slowness of the returns. A merchant or a manufacturer may turn over his capital several times in a year, while a farmer can only do so once a year, while of much of his expenditure he can only reap the full benefit after the lapse of several years; but in spite of this disadvantage, the amount of capital invested in the cultivation of the soil has gone on increasing, until the real question is not, whether more can be obtained, but whether the limit for its profitable employment has not been reached. As the poorer soils have been brought into cultivation, the returns have not increased proportionally to the increased expenditure, and the improved communications with all parts of the world have made the profitable cultivation of land more and more difficult. This latter difficulty, however, has been and is being met by the greater amount of skill and scientific knowledge which farmers of the present day possess, and which has enabled them as yet to hold their own against foreign competition. Under the Scottish system of leases, neither skill nor capital has been wanting, and it is difficult to see how a secure tenure for a limited number of years can expose a farmer to ruin and degradation, from which a perpetual lease at an increased rent would save him. Professor Lorimer, however, argues that a terminable lease is essentially bad, and that it gets worse with the lapse of time, inasmuch as the interests of landlord and tenant become more antagonistic as it approaches an end, and it becomes less and less the interest of the farmer to do full justice to the land. Compensation for unexhausted improvements and manures, which to most persons would seem a practicable remedy for this evil, is dismissed as insufficient with the remark, that it is difficult satisfactorily to estimate the value of unexhausted improvements, and the introduction of perpetual leases, which are apparently to possess most of the character-

istics of feus, but yet not to be feus, is declared to be the sole remedy for the alleged mischiefs of the present system. It is, no doubt, true in one sense that a lease gets worse as time elapses, because less time remains for the farmer to reap the benefit of his expenditure, and to gain the profits upon which he calculated, when he entered into the contract. During the earlier years of a lease the margin of profit may be smaller than during the later years, though we fancy that, except in the case of improving leases, the difference is much less than is sometimes supposed. It is, however, a mistake to speak of a terminable lease as essentially bad. The profit to be made from the occupation of a farm for twenty-one years is calculable, while a profit which is only to be realized after a long period of time has little or no present value. If farmers are to obtain perpetual leases only at increased rents, the time at which they will begin to realize profits from their farms will be perhaps indefinitely postponed, and a larger profit, which cannot be realized for ten or fifteen years, is not so attractive as a smaller return, which is certain to be obtained within two or three years, or even immediately on entry. Professor Lorimer admits that purchase of farms is no remedy for the evils of which he complains; but a permanently enhanced rent is just as much a diminution of the capital of the farmer as the payment down of a price, and if not redeemable even more so, because it would form a perpetual drain upon his resources. It is, besides, far from certain that increased rents would be generally obtained for perpetual leases. If it is often difficult at present to induce landlords to make necessary repairs and improvements, it would be almost impossible in the future, when the whole profit of such improvements would flow into the tenants' pockets. No superior thinks of expending money on improvements for the benefit of his feuars, and a landlord who had no prospect of increase of rent would be in much the same position as a superior. The nominal rents, then, might be lower, as the burden of improvements would have to be wholly borne by the tenant; perhaps even unduly lower, because the necessity for repairs and new buildings might seem more pressing to the farmer than now to the landlord. Although the nominal rents might be lower, the burden on the farmer would be at least as great, and if so, no immediate benefit would be obtained by him. Whether the land would become more productive under the proposed system is very doubtful, and unless it became so the farmer would derive no benefit from the change; that to render it more productive increased expenditure would be required is certain, as well as that the returns from the additional expenditure would be proportionally less.

Admitting, however, that higher rents would be obtained, and that the outlay of the farmer would be more than recouped by the increased production, the proposed system of perpetual leases is open to too many and too serious objections to be looked on as a practicable one.

In the first place, it would turn landlords into mere annuitants, with no more interest in the prosperity of their tenants than a superior has, and with no motive for residence beyond those of any ordinary summer visitor; while if the landlord retained the right of shooting over the lands which he had thus parted with, game disputes would be more frequent and more bitter. Landlords would soon think that they had no duties to discharge, and owed no more consideration to their tenants than a bondholder is wont to show to his debtor. In bad years a landlord would not feel it to be either his interest or his duty to assist his tenants by remission or postponements of rents, and in short would cease to have that joint interest in the soil which he at present has, and which intimately connects the prosperity of his tenants with his own.

In the next place, the tenant would be exposed to more serious risks than at present threaten him. If a farmer takes a too highly rented farm, each year of the lease as it elapses brings him nearer to his escape from a bad bargain; but in the case of a perpetual lease he must see the gradual extinction of his capital and the steady approach of bankruptcy, a not unlikely result if Professor Lorimer's anticipations of an increase of rent were realized. It is true that it is suggested that perpetual leases should be freely assignable, but then the landlord would lose the principal securities for the payment of his rent, viz. the skill, capital, and respectability of his tenant, and would be exposed to the danger of a tenant rapidly exhausting the soil, and after securing a handsome profit, assigning the lease to a new tenant, upon whose bankruptcy the landlord would receive back a deteriorated farm. Even in the case of feus—and the proposal really is to convert leases into feus—superiors do not always find the feu-duties secure. A town may be so overbuilt that the houses erected cannot find occupants, or a change of fashion or a long-continued depression of trade may so materially reduce the value of property that the superior may find difficulty in obtaining payment of his feu-duties, or at any rate discover that he has little real security for their payment. Feu-duties have in the past been generally secure from two causes. Either expensive buildings have been erected upon the ground feued, and the value of the mere ground thus rendered unimportant, or lands have been sold partly for a price, and partly for a feu-duty, which being far within the annual value of the lands, has been almost perfectly secure. In the case of farms let for a full or perhaps an enhanced rent, neither of these causes would operate. The farmer would be exposed to all the risks of a changeable climate and a variable market, and consequent risk of inability to pay his rent, while the landlord would be without protection, because there would be no margin of value as in a feu. Again, if the landlord remains bound to make improvements or repairs, or undertakes to perform other obligations towards the

tenants, he may well find in course of time that these obligations become so onerous as to more than extinguish the rent, and he may discover to his cost that he has saddled himself with a perpetual obligation instead of securing an unvarying annuity. The case of *Dunbar's Trustees* v. *British Fisheries Society* sufficiently shows how materially the lapse of time may alter the incidence of a contract, and a landlord who has granted a perpetual lease might find, like the superiors in this case, that instead of receiving payment of his rent, he had to make large and even increasing disbursements, the possibility of which he had never contemplated.

Professor Lorimer has, we suspect, been misled by the common fallacy that money rents either do not alter in value, or that if they do, their tendency is continually downwards. Old feus have gradually become less burdensome to the feuar, and accordingly rents, it may be anticipated, will become less so to the tenant, who in this prospect may be induced to give a higher rent in the meantime, trusting to reimburse himself in the gradual fall in the value of his money rent. Since the beginning of the century gold has fallen in value, but history shows very considerable fluctuations in its value, and good authorities are of opinion that the reaction against the downward tendency has begun, and that we may look forward to a period when, unless any great gold discoveries are made, gold will steadily though slowly increase in value. Landlords, superiors, annuitants, and creditors will consequently receive more than they have done in the past, and debtors will have greater difficulty in repaying money which they borrowed when it was less valuable, or in fulfilling obligations which they undertook when gold was still slowly falling. The diminution in the supply of gold has been very marked during the last few years, and were it not for the general use of gold-saving machinery, such as bank notes and cheques, the rise in its value would have been very sharp, and the pressure upon debtors very severe. At present gold has risen in value, and is likely to continue to do so. In the prospect of such a rise, the adoption of perpetual leases might have a most fatal effect on the farming interest, by steadily draining their resources, while under the present system they may reasonably look for a very considerable reduction in the amount of their rents in the course of the next few years.

In short, a perpetual lease seems to us essentially bad, just as a perpetual contract of service is essentially bad, and certain to produce hardship either to landlords or tenants, and sometimes to both. If gold falls in value, the landlord has parted with the use of his land for less than its value; if gold rises, the tenant finds himself burdened with a rent much in excess of what he contemplated, and which he finds growing difficulty to pay. While he pays the same amount of money to his landlord, he gets less money for his produce, and is thus less able to pay his rent.

A terminable lease is not liable to these dangers in the same degree, and when it runs out there is an opportunity of readjusting the amount of rent to all the ever-varying circumstances of the country, as well as to the alteration in the value of money. Alike in the interests of landlords and tenants, it will be long it is to be hoped before a system of perpetual leases is introduced, all the advantages of which can be much more readily, and without any of the risks, attained by the combination of farmers to purchase estates and divide them among themselves. "The magic of property" will then no doubt stimulate improvement and increase the productivity of the soil, but perpetual leases will only hang a millstone for ever round the neck of many an industrious farmer. —I am, etc. T.

Review.

Reports of Scottish Appeals in the House of Lords, A.D. 1851 *to* 1873: *with Tables of all the Cases cited, Notes, and copious Index.* By JAMES PATERSON, M.A., Barrister-at-Law. Two vols. Edinburgh: T. & T. Clark. 1879.

THESE two portly volumes, extending to over two thousand closely printed pages, form a vast repertory of legal case-lore. They originally formed, as we are told in the preface, part of the last twenty-three volumes of the "Scottish Jurist," and they differ from the other reports principally in having not only the opinions of the judges, but the arguments of counsel as well. This is a very important feature, and especially useful in reports of appeal cases. In many instances these arguments are essential to a full understanding of the case, and they are always of use as being models of pleading, and the way in which a case ought to be stated. The giving of these arguments is not, however, the only noticeable feature about the reports now before us: we would direct the reader's attention to several matters of detail in the arrangement of the volumes which make them specially valuable. We have, to begin with, a table of cases reported, which contains not only the names of the cases, but a short statement of the principal subjects on which they bear. The reports themselves then come, after which are given some short notes to several of the cases; whether it would not have been better to put those notes at the foot of the page below the case to which they refer, especially as we do not notice any reference to them in the case itself, is a matter on which there may be some difference of opinion. It is troublesome to turn over so many pages on the chance of finding some additional information about

a case; however, there the notes are, and though short we have no doubt they will be found suggestive. A table of Scottish cases cited in the reports next follows, accompanied by a separate table of English cases; when such cases have been more than merely cited, but commented upon, approved or doubted, special attention is directed in the table to that fact, so that the reader knows whether he will find a case merely quoted or specially dealt with in the course of an argument or judgment. A very full and elaborate index of matters, forming quite a digest in itself, concludes the book. The name of Mr. Paterson is itself a guarantee that the work is well done; nothing seems to have been left out that could in any way tend to the elucidation of the cases, or that would make reference to them more easy. By the help of the excellent tables and index which we have mentioned the reader can go at once to the case or subject of which he is in search. The reports are a valuable addition to the case-law of our country, and we are sure that before long every practising lawyer will have them at his hand.

The Month.

The Coroners' Bill.—The following evidence was given before the Select Committee of the House of Commons appointed to inquire into this bill, upon the 15th ult.:—

Dr. Douglas Maclagan, Professor of Medical Jurisprudence in Edinburgh University. He stated, in answer to the Chairman, that he was consulted by the Crown authorities on medical affairs, but held no appointment under the Crown. He was fully conversant with the practice which prevailed in Scotland with reference to the initiation of criminal prosecution, and detailed at some length to the Committee that upon the Procurator-Fiscal lay the responsibility to make an inquiry with regard to the cause of sudden death in the street, and the steps which would be taken to have the body identified and the cause of death made known. The choice of medical men for this purpose lay entirely with the Procurator-Fiscal. In ordinary cases of sudden death the medical man who had attended the deceased in his lifetime would be sufficient to certify the cause of death, because the result would be in all probability what might have been expected from the nature of the disease; but where there was any suspicion of foul play attached, an independent medical man would be appointed by the Procurator-Fiscal to make a *post-mortem* examination of the body. In a case of this kind where suspicious circumstances were involved, he did not think there was any positive authority to compel the medical man to go and examine the body should he not desire to do so, but as a general rule there was never any refusal. If it should be necessary for him to have evidence which might tend to show who had committed the crime, it was necessary for him to go to the Sheriff and get a warrant to summon witnesses. The expenses of medical men appointed to make an examination of a body were regulated. The fee was a guinea for attending the precognition before the Procurator-Fiscal, and two guineas for making a *post-mortem* examination, but the fee for chemical analysis was a separate affair. The

person who ordered the analysis would be the Lord Advocate if he were taking charge of the case, or the Solicitor-General, or Advocate-Depute. The difference between the way in which fees for *post-mortem* examination and analysis were paid was that the Procurator-Fiscal paid for the *post-mortem* examination, and the Crown Office for the analysis. He could not speak as to whether the fees were payable by local rates or Government charge. In Scotland they did not hold inquiries of this character in public-houses, but he had had occasion to make a *post-mortem* examination in a church, in a coach-house, and in a town hall in one of the small towns. Persons were not allowed to be present at a *post-mortem* examination, unless officially connected in some way with the inquiry. He did not think this system of inquiry prevailing in Scotland had given any dissatisfaction, and, as far as his personal opinion went, there were important advantages connected with it. For instance, it did not make known publicly what was the line of evidence to be led when an accused person was to be put on his trial, and ultimately saved any prejudice being formed in the public mind against the prisoner. As far as he knew, there had been no complaints as to the privateness of the inquiry. In a paper which he read before the British Medical Society some time ago, bearing chiefly upon these inquiries, he took as an illustration of the last heavy cases they had in Edinburgh the case of a Frenchman named Chantrelle, who poisoned his wife, and was executed. He stated in that paper as his belief that fifteen men would not be found without a prejudiced mind against the prisoner had the matter been reported in the public prints. He thought in the larger towns these investigations were carried on by competent medical men, but in the outlying districts there was not such efficient service, because the fees were not such as to induce a medical man to travel long distances. He did not see there was any special advantage in appointing a medical officer for this purpose, as the difficulty would be met by making fees sufficiently inducing for a competent medical officer to go into the country. On one occasion he was sent to Inverness to investigate a case where three gentlemen had been poisoned by eating monkshood instead of horse-radish, and although there was a competent medical officer at Inverness, the case was such a peculiar one that the authorities thought it necessary to send him there to investigate the matter. There were no suggestions in Scotland for assimilating the law of Scotland and England with regard to coroners' inquests. The witness was asked by several hon. members as to the expenses he received when engaged in a *post-mortem* inquiry, and stated that in the case of Chantrelle he received fifty guineas for the analysis of the viscera, but that in the great proportion of analyses nothing like this sum was paid. His regular fee was two guineas per day, and first-class fare to and from any place where the inquiry was held; but this did not nearly compensate for the loss of private practice. His plan was to charge by the time spent and trouble experienced in making analysis.

An Hon. Member.—With reference to your answer about making a *post-mortem* investigation in a church, is it not the case in Scotland that the church is used for political meetings and other secular matters? No, no; the *post-mortem* examination which I made was in an outlying district in Inverness-shire, and the church was the only place that could possibly be used. I have heard an hon. member of this House state that he had addressed his constituents from the pulpit of a parish church. (Laughter.)

The Chairman.—Order, order.

Witness, continuing, said a Justice of the Peace had no power to initiate proceedings in Scotland, and that he considered it should be one of the qualifications of a Procurator-Fiscal that he should have some acquaintance with medical jurisprudence.

Mr. W. A. Brown, Procurator-Fiscal of Glasgow, explained to the Committee that, according to the theory of the law of Scotland, the Sheriff was charged with the investigation of crime in his district, and the Procurator-Fiscal was merely the executive officer. In practice the Sheriff in more recent times did not undertake the personal investigation of crime, and instead of the Procurator-

Fiscal reporting to the Sheriff, the practice was for the Procurator-Fiscal to report to the Lord Advocate. In the strict sense of the word, there was no coroner in Scotland. In recent times it had become the practice of the Procurators-Fiscal to be coroners, inasmuch as they have the initiation of inquiry into the cause of death, and of proceeding against persons who might be implicated, but this was subject to the initiatory proceedings being taken upon the warrant of the Sheriff. Glasgow and the county of Lanarkshire were divided into police districts, to each of which was attached a surgeon, who was paid by the magistrates. When the police heard of a sudden death, or found a dead body in the public streets, it was the duty of the constable to communicate the fact to the lieutenant in the district, whose duty it was to send some competent person to make inquiry into the facts, and the result was recorded in the information which was lodged by the lieutenant of police with him (Mr. Brown). In that way every sudden death that came to the knowledge of the police was reported to him, and along with the written information came a certificate from the police surgeon. The police were required to take a surgeon to see the body, who afterwards certified as to the cause of death; but if the certificate was to the effect that from an external examination of the body the cause of death was doubtful, then they applied to the Sheriff for a warrant to have a *post-mortem* examination. As a general rule the Sheriff granted the warrant, and the remit was made to a medical gentleman, who examined the body and reported the result to him (Mr. Brown). In the great majority of cases the report of the medical gentleman was conclusive that there was no necessity for any further inquiry, or at least that no person was implicated in his death. Then his duty after that was to make a report to the Lord Advocate, who, after considering the papers generally, returned them with an order that there were to be no further proceedings. That was the mode of procedure where the result of the medical report did not suggest that any person had been implicated in the death; but, on the other hand, if the result of the medical report was the other way, it was then his duty to put any person who might be implicated under arrest. In that case he applied for a warrant of apprehension to the Sheriff, who, taking the medical report and the police petition together, granted it, and the accused person was brought before the Sheriff for examination. Supposing the police reported the death of a child who, it was suspected, had been overlaid by its mother, the medical officer reported that the child died from suffocation, and if the circumstances of the case as reported to him by the police otherwise indicated guilt, he would ask for a warrant of apprehension. The accused party being brought before the Sheriff, was cautioned by him that he need not answer any questions put to him, as the answers would be used against him when tried. After the declaration by the prisoner was taken, the accused person was remanded for further examination. That was the first order given by the Sheriff, and the remand generally lasted for a period of eight days. During that time the Procurator-Fiscal got up the case, that was to say, took precognitions, examined witnesses, etc., and at the end of that period he brought the case again before the Sheriff, who had to consider these precognitions, and say whether or not there was a case for committing for trial. If the Sheriff was of opinion that there was not a *primâ facie* case for trial, the prisoner was liberated, but if on the contrary the precognitions were admitted, the prisoner was sent back for trial. It was then the duty of the Procurator-Fiscal to report the matter to the Lord Advocate, who decided how the case was to be disposed of in either of three ways. The prisoner could be tried at the Circuit Court, or by the Sheriff and a jury, or by the Sheriff summarily. This was a general outline of the criminal prosecution in Scotland, and he might mention that until the prisoner was committed for trial he was not entitled to see any person.

By the Chairman.—As a rule he found prisoners willing to answer the questions put to them. Those who were familiar with crime rather declined, but those who were not answered questions readily. There were frequent

instances, however, of prisoners declining to answer questions. After the Procurator-Fiscal had made his report to the Lord Advocate, it was in the power of the Lord Advocate to stay proceedings altogether. In Glasgow, the late Sheriff of the County, acting under the theory of his office, appointed two medical gentlemen for the Lower Ward of Lanarkshire. They have held the office for a period of ten years, and a remit to investigate the circumstances attending the death of a person was granted to one or other of these gentlemen. The appointment was not a legal one, but only customary—an understanding in fact that the Procurator-Fiscal would employ one or other of those gentlemen. They were not paid by salary but by fees. All the expense of the prosecution was paid by Government, although it was originally borne by the county. The charge of prosecutions had been transferred from the local rate to the Government a very considerable time before he held office. All cases of fire were reported to him by the police, and he made an independent inquiry, the result of which he reported to the Lord Advocate. If he had reason to suspect that it was wilfully done he put the person under arrest, but if not, the matter was allowed to drop. The police had implicit instructions to report every case of fire to the Procurator-Fiscal, the investigation into which was borne in the same manner as the medical examination. There was no contribution to the expense incurred by the fire insurance people. With regard to the police surgeon, he was sure he had the best possible medical advice, and the system of investigation was an admirable one. These medical gentlemen who held the office in Glasgow made from 200 to 300 *post-mortem* examinations every year. There was not the least difficulty in Glasgow in getting medical gentlemen of the highest standing to undertake the position.

By the Attorney-General for Ireland.—You know the English system of coroners? *A.* Generally. *Q.* And you have considered your own system as contrasted with the English system? *A.* I have. *Q.* And are you of opinion that there should be introduced into Scotland a system analogous to the coroner's inquiry of England? *A.* I am not. But I feel bound to say that there are many people in Scotland, whose opinions are of some weight, who say that there should be more publicity in connection with the investigation of my office. I do not think generally, however, that the people of Scotland uphold that opinion.

By an Hon. Member.—As far as he knew, the present system was considered eminently satisfactory. He did not know of any case in which the Lord Advocate refused to sanction a private prosecution, or of a case where the friends of a person who had died suddenly, or under circumstances of some suspicion, had complained that there was not a complete inquiry under the present system. He thought that the Scottish system was advantageous in this respect, that it spared the feelings of friends. In many instances if there was a public inquiry, in the case of a sudden death as in England, a great many people would be required to make a painful appearance at a time when they should be spared. This was avoided by the system of private inquiry.

The Committee then ordered the room to be cleared for the purpose of considering their report.

Fixity of Tenure.—The following letter appeared in the *Scotsman*. After giving the substance of Professor Lorimer's communication to us, the writer proceeds as follows:—

Such is the scheme of the Professor of Public Law, and which he thinks might be most conveniently worked out by the formation of a company in each county town. In it may exist the germ of a greater salutary rural reform; but we confess that we don't see the probability, or even possibility—nor perhaps does the Professor himself do so—of its being early realized. Neither, indeed, would we say that it is desirable it should be so, unless some—apparently to us very evident—objections were obviated. We are quite

with the writer in thinking that thorough permanency of tenure would attract more capital to cultivation; that increase of capital in cultivation is the best means of increasing productiveness, and that increased productiveness (besides its other benefits to the public) is the only legitimate and permanent ground of increased rents, or, in other words, increased value of property. But when he says, "only men of some substance could avail themselves of an arrangement which would yield no profit in the first instance," we would ask him to substitute "ought to" for "could." We greatly fear that without some such safeguard in the Act of incorporation as a clause, that unless the whole directorate or majority of the shareholders were satisfied of an offerer or transferee being possessed of at least eight or ten times the former assessed value of the land, he should be ineligible as permanent tenant, many parties with as small means as the present tenants would compete for the occupancy gilded by the hope of permanency. Should such hope then force rents—as indeed is intended—to a still higher point than at present, many of the holders under the new code would be even less permanent than under the old, and unless the dominant proprietors had hypothec to protect their interests, we fail to see that their security would be at all absolute. Further, if all restrictive clauses as to cropping were abolished—as would be a natural corollary to such a system—the proprietor's security would be greatly impaired. Although such restrictions are often carried too far, yet the laxity of allowing a new occupant, without even paying a premium to enter on fine ranges of rich old pasture, and probably throw them back into the proprietor's hands in stubble, without even straw or manure to restore it to fertility, would lead to the most disastrous consequences. But the difficulty at the threshold appears to us to be, how are such companies to get possession of any very large proportion of the land coming into the market. As anything approaching to compulsory legislation is very properly repudiated, they could only get possession by beating other offerers in fair competition, and for moderately sized residential estates, with the amenities of wood, water, and other attractions more appreciable by individuals than by companies, we rather think they would be rarely successful. For very large estates, or those with fewer attractions, they might find the competition less formidable, and in the redisposal of such their intervention, under some such safeguards as we have hinted at, might be more useful.

Although, on these grounds, we think Professor L.'s scheme far from unobjectionable, very possibly such faults and imperfections might be in a great measure explained away in its further development by the same pen, or obviated by special provisions in the necessary legislative enactments. At all events, we consider the proposal well worthy of being discussed by the wide community interested in it, and that none the less so from the thoroughly isolated independence of the writer, obvious from the fact—as patent to himself doubtless as any one—that his views would please no political party. At the very outset, as we have said, he condemns hypothec and entail, and then the whole tendency of his project is to raise rents. We very much sympathize with him in both objects, provided the latter could be attained by supplying the present industrious and deserving tenantry with more capital, so as to enable them to greatly increase their produce. That such increase of produce, and thereby of rent, is attainable over a considerable part of Scotland, and to a far greater extent in England (especially as to green and fallow crops), is undeniable; but the source from whence the capital necessary therefor is to be obtained is to us still a mystery which the writer of the letter in question has scarcely solved. In conclusion, we must guard ourselves against being supposed to have any wish or expectation of seeing rents raised, or even in very many cases maintained, under the present farming arrangements and prices of produce. On the contrary, we are glad to recognise the advent of a pretty general fall of rents, on reletting, to the extent of probably about 30 per cent., and we hope that similar reductions may be almost generally extended to tenants in occupation, as probably the only means of saving them from ruin. There are of course many cases in which such may not be necessary, and of which the

proprietor or his agent ought to be able to judge tolerably well. Further, as the present very depressed state of the markets and other circumstances narrowing the margin for rent, may not be permanent, we would scarcely expect proprietors to promise such reductions at once for the whole period of long leases. Indeed, from our own rather trying experience of farming from 1848 to 1853, when markets for all agricultural produce were fully as depressed as at present, and soon after which, owing to the increased supply of gold and the Russian war, prices went up with a bound, we have great hopes that the present depression and consequent fall of rents may be only temporary, and should the next rally be caused by some great stimulus to the productivity of land, more than by any great rise of prices, so much the better for the community.—I am, etc. T. W. L. (Isle of Man.)

Married Women's Property (Scotland) Bill.—The following is the text of this bill, which is introduced by Mr. Anderson, M.P. :—

Whereas an Act was passed in the fortieth and forty-first years of the reign of her present Majesty, intituled "An Act for the Protection of the Property of Married Women in Scotland," and it is desirable to increase that protection, and particularly to extend to Scotland the benefits of an Act passed in the thirty-third and thirty-fourth years of the reign of her present Majesty, chapter ninety-three:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. No personal or moveable estate or money pertaining to a married woman at the time of her marriage, or acquired by her during marriage, shall be subject to the jus mariti and right of administration of her husband, unless and until the same is reduced into the husband's possession; and any such estate or money, whether reduced into the husband's possession or not, may be secured to the separate use of the wife by investing the same in the name of the wife upon heritable security, or in any of the modes hereinafter specified.

2. Sections two, three, four, five, and six of the second recited Act shall apply to Scotland, and all estate or money invested in terms thereof for the separate use of a married woman shall be held by her exclusive of the jus mariti and right of administration of the husband of such woman, or of any husband whom she may thereafter marry.

3. Where any woman married after the passing of this Act shall during her marriage become entitled to any personal estate as next of kin or one of the next of kin of an intestate, or to any sum of money destined to her under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use and exclusive of the jus mariti of any husband whom she has married or may marry.

4. Where any heritable estate shall descend to any woman married after the passing of this Act as heiress or co-heiress of an intestate, or as heiress of entail or provision, the rents and profits of such estate shall, subject and without prejudice to the trusts or conditions and provisions of any settlement affecting the same, belong to such woman for her separate use, and exclusive of the jus mariti and right of administration of any husband whom she has married or may marry.

5. A policy of assurance effected by a married man on his own life, and bearing to be for the benefit of his wife, whether absolutely or in liferent, shall be effectual according to its terms in favour of his wife, to the extent of the interest thereby limited.

6. This Act shall apply only to Scotland, and all questions arising under it may be heard and determined either in the Court of Session or in the Sheriff Court of the county in which the cause of action shall arise.

7. This Act may be cited as "The Married Women's Property (Scotland) [illegible], 1879."

Uncertificated Legal Practitioners.—The following question was asked in the House of Commons on the 14th ult.:—

Mr. MACKINTOSH.—I beg to ask the Lord Advocate if his attention has been called to the number of uncertificated legal practitioners in Glasgow and other towns in Scotland, and whether he will give orders to have the laws as to the admission and annual licence enforced?

The LORD ADVOCATE.—I have received a good deal of information to the effect of that contained in the question of which the hon. member has given notice, but if I replied to the question merely in the affirmative I might deceive. According to the law of Scotland, no man is entitled to practise as agent in any court without being possessed of certain qualifications, or the law enacts penalties if he is not possessed of those qualifications. Then, in the case of any person choosing to act as conveyancer, he must take out a licence, or he is liable to heavy penalties. Whenever cases of the infraction of the law have come to my knowledge I have always directed a prosecution. But there is a third class, with regard to whom the information furnished to me is that it is a class of persons who, not professing to be lawyers, at the same time profess to give legal advice upon very moderate terms. As the law of Scotland at present stands, no penalty is attached to any person so acting, unless the acting is accompanied by misrepresentations of a legal character.

Difficulty caused by the vacant Judgeship.—Townsend v. *Leisler, Bock, & Company.*—This case was at the instance of Joseph Townsend, manufacturing chemist in Glasgow and in Germany, against Leisler, Bock, & Company, merchants, Glasgow, for count and reckoning, and for payment of £10,000, as the sum alleged to be due in the accounting, and also for payment of £15,000 damages. Lord Curriehill remitted to an accountant in Glasgow to examine the books and accounts of the defenders, and of the firm of Leisler and Townsend, and to report upon certain alleged errors and overcharges. The pursuer reclaimed, and the Court altered the Lord Ordinary's interlocutor in so far as making the remit applicable to other years than those mentioned in the Lord Ordinary's interlocutor. Against that judgment the defender has presented an appeal to the House of Lords. The pursuer lodged a petition under the Act 4 Geo. III. cap. 151, sec. 17, and in terms thereof moved for execution pending the appeal. On the calling of the case the Lord Justice-Clerk remarked that under the statute it could only be heard before four judges, and as the Second Division at present consisted only of three, the case could not proceed unless another judge were requested to attend. The case was ultimately arranged to be heard before the three judges of the Second Division, along with one of their Lordships of the Outer House.

A Debtor's Assets.—The following communication was received the other day by an American lawyer in answer to a request for the settlement of an old claim:—

My dear Sir,—I am informed by yours of the 1st inst. that the estate of the late —— holds three notes against me, respectively $81.50, $94.58, $119.50, and desiring me to communicate with you in reference thereto. I congratulate the estate on holding a claim against a person so abundantly able to owe it as myself, in fact, were it ten times the amount, I should be able to owe it with equal prospect of payment. You speak of making me trouble and expense; the latter would be impossible as I have nothing to spend; the former would only be a verification of the scripture text, "Man born of a woman, his days are few and full of trouble." I trust the executor (whoever he may be) of Mr. S——'s estate is not so lost to all the nobler impulses that actuate the human heart, as to desire to plunge a man (who is actuated by honest motives, however unfortunate he may have been) into unnecessary difficulty, as no benefits could possibly accrue to Mr. S——'s heirs by such a course. In order that you may form a correct estimate of the amount the estate would be likely to receive by getting out an execution and levying, I will give you a comprehensive inventory of my effects, exclusive of personals exempt by law from execution: one saw-buck, one buck-saw, one hand-saw, three waggon wheels (all odd ones), one waggon shaft (with cross-bar attached), one riding saddle, the stirrups of which have been sold for old iron, it is also minus one flop as, needing soles for a pair of boots, and being unable to purchase sole-leather, this middle flop answered the purpose admirably; the circingle has also been substituted for a pair of suspenders, as my pants (the only pair I have) needed girthing about the waist; one old harness, nearly complete, and with about five dollars expended on it for repairs, I think would bring about a dollar and a half at auction; one old sleigh—this is in a rather dilapidated condition. It might answer, however, as a foundation for a hen-coop; one lame chicken, one pair of pine crutches. I am not sure but what the last-named is exempt; I do not know, however, as the law makes any allowance for a man who is occasionally lame. This, I believe, includes all. In case of an attachment, however, according to the laws of this State, it would be assigned for the benefit of ALL creditors. You would probably get for your share the lame chicken or the crutches.

Throwing all jesting aside, Mr. L——, I have really got nothing, nor do I see any prospect ahead of ever being able to pay it. The executor might just as well put those notes down as so much waste-paper. I think you have made a great discovery in those notes, and that discovery is, "Perpetual Motion," as there is no question but what THEY will run for ever. Hoping you are satisfied of my ability to owe those notes, I remain, with great respect and good wishes. —— ——.—*Albany Law Journal.*

The Scottish Law Magazine and Sheriff Court Reporter.

SMALL DEBT COURT OF ABERDEEN.

Sheriff Dove Wilson.

HAYHURST *v.* CALEDONIAN RAILWAY COMPANY.

This was an action at the instance of Lieut.-Colonel Hayhurst of Bostock Hall, Middlewick, against the Caledonian Railway Company for £10, 10s., being the value of a pointer dog puppy belonging to him, which was along

with a pointer bitch puppy delivered at the station at Aberdeen on 1st November 1878, for the purpose of being conveyed to him at Bostock Hall, but which the Company failed to deliver or restore.

The Sheriff, in deciding the case, said:—

It appeared that the consigner in this case had packed two dogs in a hamper in the usual way in order to have them sent to the consignee, and it had been proved that there had been nothing defective about the hamper. It had been received by the Railway Company without objection for the purpose of being taken from Aberdeen to Hartford in Lancashire. No written contract was made with reference to it, and no reference was made to any special conditions as being contained in the Railway Company's time-tables, or other notices, and no ticket was given for it. It was simply accepted for transit without anything more. It left Aberdeen by the 12.23 P.M. mail train, and got safely as far as Warrington, which it reached about midnight. The hamper remained at Warrington for seven hours, and was then put into the train for Hartford, and when that station was reached it was found that one of the dogs had escaped. The other dog was found with its head out at a hole in the hamper, and from the appearances, the station agent at Hartford believed that the dog that was lost must have got out by gnawing a hole in the side and thus escaping. There was no contradiction of the conclusion thus come to by the station agent, and therefore it must be accepted as true.

These were the main facts of the case, and upon these facts some interesting questions of law had been argued.

The first of these was whether the edict which we have derived from the Roman law, and which regulates the common law as to carriers in Scotland, applied to a case of this kind. That was a question that had been a good deal discussed of late, and upon which there was no direct authority, but he had come quite clearly to the conclusion that the edict must be held to apply. The words of the edict were quite general, and were to the effect that everything which is intrusted to the persons to whom it applies—that is, to carriers, stablers, or innkeepers—must be returned or paid for. The word "thing" there has never been doubted to include living things as well as dead things in the case of stablers. He therefore took it as clear that it must have the same meaning with regard to the carriers mentioned in the edict also, unless there be some ground for holding the contrary. There was no decision or dictum to the contrary, and indeed it would appear that it was only quite recently that the doubt had been started. Of course in applying the edict to living things a certain exception always requires to be made as being reasonable and as arising out of the nature of the things. For example, if an animal be lost in transit through something inherent in the animal and without any negligence on the part of the carrier, it would be inequitable to hold the carrier to be liable. For example, if the animal died from natural causes on the journey, it would be absurd to ask the carrier or anybody to pay its value. On the same principle, if it escaped in transit from its own desire for freedom and without negligence on the part of the carrier, it would be equally unreasonable to say that the carrier was liable. And that, he took it, was the meaning of the observation that had been quoted to him as having been made by Lord Moncreiff in the case of Paxton against the North British Railway Company (9 M. 50), but then there was nothing in the law which was peculiar to the case of animals in all this. The same doctrine applied to inanimate things. For example, if wine be sent in a cask, and the cask be insufficient and the wine leak, without any fault on the part of the carrier, he was not responsible; and, in the same way, if an article liable to spontaneous combustion be sent, and the article took fire, without any fault being attributable to the carrier, it was quite clear he was not liable. Therefore, subject to the exception he had explained, he thought the edict applied.

The second question that had been argued was whether, in carrying such articles as dogs, the Railway Company were to be considered as common carriers. That was a question which concerned our neighbours on the other side

of the Border much more than it does us, because the expression "common carrier" was an expression purely of English law, and in the case of a Scottish carrier the only question that had to be argued was whether it did or did not fall within the edict. But even in the case of the English law, as far as he could make out, the question that had to be discussed there was much more a question of words than a question of things. In a judgment which was given by Justice Willes in the Great Western Railway Company against Blower in the 41st volume of the *Law Journal* (Common Pleas), p. 268, Justice Willes came to that conclusion, and the grounds upon which he did so seemed to be entirely satisfactory. As Justice Willes put it, it was a matter of no practical importance whether railway companies when they carry such things as dogs are not to be held as common carriers but as paid bailees, or are to be held as common carriers, subject to this consideration that they are not to be liable for any loss arising to the animals from something inherent in themselves, and where there is no negligence or fault on the part of the company. The result of this view of the English law would be to bring it exactly to the same point as the Scottish law, and to give to the carrier in England the same defence as he would have under the edict in Scotland. That, however, was a matter more for English lawyers than for Scottish. This was a Scottish contract made in Aberdeen, and therefore the Scottish law applied to it.

Another question that had been argued was whether the defenders in this case were entitled to plead any objection in restriction of their liability in respect that there was no signed contract, as was required by the Railway Traffic Act of 1854. He did not think that the provisions of that Act applied to a case like this. In this case the exception that he thought the defenders entitled to the benefit of, was one which he thought they were entitled to have at common law and apart from every contract; and he had found, moreover, that in two English cases it had been held that the statute did not apply to cases like the present, in which the injury arose from pure accident without neglect or default. The first of these cases was Harrison against the London and South Coast Railway Company, in the 31st volume of the *Law Journal* (Queen's Bench Division), p. 113; and the second was the case of the North-Eastern Railway Company against Richardson, in the 41st volume of the *Law Journal* (Common Pleas), p. 60, and it so happened that both of these cases were cases where dogs were in question, and where they had escaped by pure accident, without negligence on the part of the company. In the first of these cases there happened to be a written contract, but the Court held it was unnecessary. In the second case there was no written contract.

A fourth question of law had been argued, namely, whether the defenders were entitled to restrict their liability to any greater extent in virtue of certain notices that they alleged they had put up at their railway stations, and that they alleged were contained in their published time-bills. In regard to that contention, he must say that although there was ground for arguing it, he thought it extremely doubtful whether it could be maintained, and he was quite clear upon this, that according to Scottish law, no notice of that kind could be considered as good unless it was brought home to the personal knowledge of the consigner. That was the old doctrine of the Scottish law as laid down by Professor Bell in his Commentaries, and it seemed to him, especially in present circumstances, to be a matter of mere common-sense, because nobody could be expected to read all the heterogeneous mass of notices that are nowadays put up in railway stations, with the view of seeing whether they contain some provisions that concern himself, and nobody could be expected to purchase and study those volumes of time-tables that the railway companies find themselves obliged to publish. Here, no personal knowledge of the contents of those alleged notices had been brought home to the consigner.

The result of the various questions that he had gone over came then to be simple enough. It was just this, that under the edict—that was, under the old Scottish common law—the defenders were liable for the loss, unless it happened without negligence on their part; that they were not deprived of the defence of "no negligence" by reason of there not having been a written contract made

in terms of the Railway Traffic Act; and that they were not entitled to set up any further defence in virtue of their alleged notices. If therefore the accident happened from the inherent desire of the dog to escape, and without any negligence on the part of the defenders, then they were free, but it was for the defenders to prove that they acted without negligence. That brought them down to the simple point whether there had been negligence on the part of the defenders. In order to answer that question it was necessary to consider a little more particularly where the accident precisely happened. It happened clearly between the arrival at Warrington and the arrival at Hartford, and therefore it must have occurred either during the seven hours of the stay at Warrington or during the half hour of the journey between Warrington and Hartford. It seemed to him most likely that it occurred during the seven hours that the hamper was at Warrington. The hamper was a long time there, and apparently under no kind of observation. On the other hand, it was only a short time in transit to Hartford, and during that time it was likely to be more or less under the observation of the guard. He therefore came to the conclusion that the accident happened at Warrington. If he was wrong in regard to that conclusion the defenders had themselves to blame, because, although they had carefully brought witnesses from other places where it was clear that nothing wrong had taken place, no witness made his appearance from Warrington, which was the place where there was ground to suspect that the accident had happened; and therefore, in the absence of any evidence to the contrary, and looking to the natural result of the other evidence, he was brought to the conclusion that the accident had happened at Warrington. As to what had happened particularly at Warrington, they had no evidence, but he thought it was quite safe to come to this further conclusion, that the accident would not have happened at Warrington if the hamper had been placed in an enclosed place. If that had been done, and the dog had escaped, it would have been found there on the door being opened, and could have been secured and put up again. The hamper must therefore have been left in an open place, and the question came then to be, was it negligence to leave that hamper for somewhere about seven hours during the night-time in an unenclosed place? He was clear that it was negligence. The hamper was invoiced as containing dogs, it was sent by express train as such, and therefore the defenders had their attention drawn to the fact that it was something requiring more care than usual. The defenders, moreover, were paid not merely for carrying things, but also for taking the custody of things while they lie at their stations. The one was just as much a part of their duty as the other, and they were entitled to charge for the one —and did charge for it he had no doubt—just as they charged for the other. Therefore they were bound under their contract to take good care of the hamper while it was lying at Warrington. He did not think it was asking too much of paid custodiers of an article like a hamper containing dogs that, if they were to leave it for somewhere about seven hours without observation, they should put it in an enclosed place. It was an easy and very natural precaution to take, considering that the desire of dogs to escape must be well enough known to everybody, and therefore he thought, under the circumstances, that it was a reasonable precaution which the defenders should have taken. He thought, consequently, that their not taking that precaution was negligence upon their part, and applying the principles of law that he had explained, he thought that made them liable for the value of the dog.

The last question to be considered was what that value was, and no doubt the claim was for a largish sum, but people gave large prices for dogs, and it had been proved that ten guineas was the value put upon this dog by the parties who bought and sold it, and although there might be doubts whether everybody would have thought that the dog was quite worth so much, the fact remained that that price had been paid for it, and he was therefore bound to give the pursuer decree for the sum sued for, and of course expenses must follow the result.

Act.—Smith.——*Alt.*—Prosser.

SHERIFF COURT OF INVERNESS-SHIRE.

Sheriffs Cooper and Ivory.

MACKAY AND OTHERS *v.* GALLIE.

Title to sue.—The pursuers in this action being the president, treasurer, and secretary of the Inverness Plasterers' Union, "with consent and concurrence of" John Bain, late secretary of said Union, sought to recover from the defender a paper writing alleged to embody the terms of an agreement come to between the members of the Union and certain master plasterers, of whom the defender was one. They alleged that the defender, on the pretext that he desired to make himself more perfectly acquainted with its contents, procured access to the writing and carried it away from the said John Bain, late secretary, promising to return it on demand. It was pleaded for the defender that the pursuers had no title to sue. It was replied for the pursuers that they had each a separate interest in the writing, and were entitled to recover it, or at any rate John Bain who handed the paper to the defender on a distinct promise to return it was entitled so to recover. The following are the interlocutors with notes of the Sheriff-Substitute and Sheriff:—

"*Inverness*, 28*th February* 1879.—The Sheriff-Substitute having heard parties' procurators upon the closed record—Sustains the first plea in law stated in the defence: Dismisses the action and decerns: Finds the defender entitled to expenses, and remits, etc. W. S. Cooper.

"*Note.*—This action is brought by the president, treasurer, and secretary of the Inverness Plasterers' Union, otherwise the United Operative Plasterers' Society, with consent of John Bain, late secretary, to recover a paper writing said to be taken by the defender, under promise to return it, from John Bain on 16th November 1878 (prior to which date John Bain had ceased to be secretary of said Union or Society), or on some other day betwixt 7th September and 30th November 1878.

"The Union or Society in question is admitted to be a voluntary association and therefore cannot sue in the name of its office-bearers, and it is not averred that the office-bearers sue in their own name for implement of obligations *expressly* come under to them in their official capacity. The Sheriff-Substitute considers that he has no option but to dismiss the action with expenses to the defender. W. S. C."

"*Inverness*, 17*th April* 1879.—The Sheriff having heard parties' procurators, and considered the pursuers' appeal and whole process—Dismisses the said appeal and affirms the interlocutor appealed against: Finds the defender entitled to additional expenses, and remits the account thereof when lodged to the auditor to tax and report. W. Ivory.

"*Note.*—The Sheriff concurs in the views of the Sheriff-Substitute. The pursuers' agent indeed did not dispute that the action was not competently brought in name of the Plasterers' Society, and admitted that to render such an action competent it ought to have been brought in the name of all the members of that Society. He maintained, however, that the action was brought by the pursuers in a private capacity. But it is clear from the petition that the action was truly raised by the pursuers, not as individuals, but in their character as office-bearers of the Plasterers' Society, and that the attempt to maintain that the action was raised by them as individuals was a mere after-thought. Further, it appears from the statement of the pursuers appended to the petition that the document sought to be recovered was the property of the members of the Society, and that the pursuers, as individuals, had no right to sue for it.

"On these grounds the Sheriff is of opinion that the action has been properly dismissed by the Sheriff-Substitute. W. I."

Act.—Scott.——*Alt.*—D. J. Mackay.

SHERIFF COURT OF ARGYLESHIRE (INVERARY).

Interim Sheriff-Substitute Hamilton.

COTTON v. SMYTH & BROWN.

Poinding of the ground—heritable creditor—competition.—The holder of a bond over certain heritable subjects, part of a sequestrated estate, raised an action of poinding of the ground before the confirmation of the trustee, and the poinded effects were sold. The holder of a prior bond over the same subjects, who had also raised a poinding of the ground, but subsequently to the confirmation of the trustee, entered appearance and claimed the proceeds. The decree of poinding was granted in both actions on or about the same day. In the competition preference was given to the holder of the prior security, it being held that his poinding was brought timeously, and in the circumstances that it was unnecessary to consider whether or not his poinding, being brought after the confirmation, would be effectual in a competition with the trustee.

The facts of the case are explained by the following interlocutor and note of the Sheriff-Substitute:—

"*Inverary*, 15*th March* 1879.—The Sheriff-Substitute having heard parties' procurators, and considered the condescendence and claim for the claimant, William Binnie Cotton, and the condescendence and claim for the compearer, Dugald MacLachlan, with the debate and whole process—Finds that the said Dugald MacLachlan is the holder of a bond and disposition in security over certain subjects at Glenburn, Ardrishaig, with the cottage known as Glenburn Cottage, belonging to William Smyth, distiller, Glengilp: Finds that the said bond and disposition in security is dated the 25th and recorded on the 27th of February 1874: Finds that the claimant, William Binnie Cotton, is also the holder of a bond and disposition in security granted by the said William Smyth over the same subjects: Finds that this bond and disposition in security is dated the 9th and recorded on the 15th of July 1875: Finds therefore in law that the bond and disposition held by the said Dugald MacLachlan being prior in registration is a heritable right preferable to the bond and disposition of the said William Binnie Cotton: Finds further that the first petition of poinding the ground was brought at the instance of the said William Binnie Cotton on the 11th of October 1878: Finds that while this petition was in course of proceeding, namely, on 9th November 1878, the compearer, Dugald MacLachlan, raised an action of poinding the ground over the same subjects: Finds that decree in both actions was granted on the 22nd of November: Finds that the poinding of the compearer, MacLachlan, was brought timeously and without undue delay: Finds that the poinded effects were sold on the 16th of January, and produced the sum of £118, 12s. 3d. sterling, to which sum, less £14, 11s. 10d. sterling, expenses of sale, ranks and prefers the compearer, Dugald MacLachlan, *primo loco*: Finds the said Dugald MacLachlan entitled to expenses as against the said William Binnie Cotton: Allows an account thereof to be given in, and remits the same to the auditor to tax and report, and decerns. J. Guy Hamilton.

"*Note.*—In a competition between two heritable creditors over the same subjects, it is settled law that the preference of one bond over another depends not upon priority of diligence, but upon priority of registration, formerly of the instrument of sasine, now of the security itself.

"In the present case there can be no doubt which of the two heritable securities has the priority, that held by the compearer, MacLachlan, being registered on the 27th February 1874, whilst that held by the claimant, Cotton, is not registered for more than a year later, viz. 15th July 1875.

"No doubt, as said by Lord Deas in the case so much relied on by both parties at the debate (*The Royal Bank* v. *Bain*, 4 Rettie, 985), 'the existence of the right to seize is not enough. The seizure must be actually made.' Did, then, the prior security-holder make his seizure timeously in the present case?

The second bondholder was beforehand undoubtedly, but before he had completed his poinding and sale the prior security-holder stepped in and asserted his claim. The question is, Did he do so timeously as between himself and the postponed creditor?

"The first poinding was brought on the 10th of October 1878, the second on the 9th of November 1878, but the decree of poinding the ground was granted in both actions on the same day, viz. 22nd of November 1878. Now putting out of view the question of the confirmation of the trustee for the present, and supposing that these two bondholders had been the only creditors on the estate, can there be any doubt that the second poinding would be in time to entitle the creditor bringing it to have the benefit of his diligence?

"The first action was still incomplete, no sale had taken place, the moveables were still on the ground, no decree even of poinding had been granted when the second action was raised.

"On this point the words of the Lord Ordinary in the case already referred to are most apt. He says (p. 988), 'The fact that a creditor had executed a poinding of the ground would not prevent a prior creditor from asserting his preference, and it is settled law that the execution of a summons of poinding is sufficient for this purpose. Applying the law here stated to the rights of the two heritable creditors in the present case *inter se*, the Sheriff-Substitute can have no difficulty in holding that the compearer, MacLachlan, brought his poinding timeously.

"If that be so, he being a prior heritable creditor, is entitled to be ranked and preferred to the second heritable creditor, which the Sheriff-Substitute has accordingly done.

"It remains now to consider whether in this view the relation of the parties is affected by the confirmation of the trustee.

"The Sheriff-Substitute is of opinion that the rights of the heritable creditor were not in any degree affected thereby. For supposing that it were necessary for the poinding to be effectual that it should be raised before the confirmation of the trustee, it by no means follows that all the heritable creditors should raise their actions before the confirmation. One summons of poinding brought timeously intercepts the claim of the trustee, it removes all the poindable effects out of his hand, but leaves them open to all the heritable creditors according to the priority of their rights. They must, of course, make this claim in time.

"In the present case the prior heritable creditor was in plenty of time, for his decree of poinding was granted on the same day as that of the postponed creditor, and that being so, it is quite impossible that the priority of his rights should not receive effect.

"It would seem, curiously enough, that this question of the right of a first bondholder intervening in the poinding of a second bondholder has never been made the subject of a decision of the Supreme Court. In the Sheriff Court of Renfrewshire, at Greenock, a case turning on this very point has been decided (*The Royal Bank of Scotland* v. *Adams*, 4 *Scottish Law Magazine*, p. 139). Adams was a second bondholder and brought an action of poinding on his bond; before it was completed a prior bondholder, Dixon, stepped in, the Sheriff-Substitute preferred him, and the Sheriff (Fraser) adhered. In the case of *Campbell* v. *Paul* (13 S. 237), Lord Mackenzie states the law on this subject in these words: 'In the same manner, if a posterior real creditor used a poinding of the ground, and the prior creditor did not come forward in due time, he was cut out of any right to vindicate the moveables attached by the posterior creditor.'

"That is just the converse of the present case; here the prior creditor has come forward timeously, and therefore has not lost his right.

"In the view of the case which has just been indicated, it is unnecessary, in the opinion of the Sheriff-Substitute, to consider whether or not a poinding brought after the confirmation of the trustee would be effectual in a competition with him. Here all questions as regards the trustee are set at rest by the

fact that one action of poinding was brought before his confirmation. The point is, however, an important and a nice one. The *obiter dicta* that have been uttered on it are not altogether on one side.

"Lord Jeffrey and the first Lord Mackenzie, in *Campbell* v. *Paul*, are of opinion that the confirmation would exclude the heritable creditor who had not raised his action before its completion. The second Lord Mackenzie, in Barstow's case (*Barstow* v. *Mowbray*, 18 D. 846), takes the opposite view, whilst admitting that it is a question not free from difficulty.

"As it is not necessary for the decision of the present case, the Sheriff-Substitute has seen no reason for entering upon it. J. G. H."

Cotton appealed to the First Division of the Court of Session, but withdrew his appeal.

Act.—Douglas.——*Alt.*—MacLachlan.

SHERIFF COURT OF ABERDEEN.

Sheriff-Substitute John Comrie Thomson.

EARL OF KINTORE *v.* MITCHELL.

This action was raised in the Sheriff Court, Stonehaven, by the Earl of Kintore, who asked the Court to interdict David Mitchell, sen., Scotston, St. Cyrus, and David Mitchell, jun., Brunton, Laurencekirk, farmers at Honeyhive, from removing from the farm-steading of Honeyhive any dung made upon the said farm since laying down the green crop of the year 1878, and from using or applying to the soil of said farm any portion of said dung which may have been already removed, and to ordain them to collect the said dung so made and form it into one or more proper dunghills at the said farm-steading of Honeyhive at or before the term of Whitsunday next. Agents having been heard, Sheriff Comrie Thomson has now pronounced the following interlocutor:—

"*Stonehaven, 2nd April* 1879.—Having heard parties' procurators upon the foregoing petition and caveat, grants interim interdict as craved.

"John Comrie Thomson.

"*Note.*—The object of this petition is to prevent the respondents from removing from their steading or from applying to any part of the soil of their farm dung made upon it since laying down the green crop of the year 1878. It appears that the respondents are manuring a certain field which they intend to sow with drilled beans, and they claim to be entitled to do so. In stopping the respondents at present I must be guided (first) by what appears to me to be the sound construction of the lease; and if there be room for doubt about this, then (second) by a consideration of whether more harm will ensue from letting the respondents proceed with their manuring than from interdicting them. By the regulations of the estate, which I cannot doubt are well known to the respondents, and which at this stage of the proceedings, when immediate action is necessary, must be taken as regulating the question, the proprietor reserves to himself right to the whole dung made on the farm of an outgoing tenant after laying down the green crop of the preceding year on payment of half its value. The only exception to that is that if the tenant sows wheat as part of his waygoing crop he may use what dung he finds necessary for that purpose. The tenants here are outgoing at certain fixed periods during the present year 1879. *Inter alia* they must leave the field in which they are planting drilled beans, and the manuring of which is now in question, at the separation of the crop from the ground. The respondents maintain that drilled beans are a green crop, and that, as they are entitled to nineteen crops commencing with crop 1861, they are entitled to the green crop of this year. I am of opinion, first, that, according to the general understanding of agriculturists, beans are not 'a green crop.' That expression, as I understand it

applies to the root and leaf producing crop, as distinguished from a crop that matures its seed; and beans belong to the latter class. It was stated on behalf of the respondents that this is not the general understanding of the district, and it may be possible hereafter for the respondents to substantiate that statement. Not being a practical agriculturist, it is necessary for me to determine the question at present by such considerations as these: The nature of the crop, which seems to me to be allied to what are known as corn crops more nearly than to such crops as turnips, potatoes, etc.; the fact that this classification has the authority of Mr. Stephens' well-known work on the farm; that beans are treated as grain crops in the fiars, and also in the Board of Trade Returns. If this view is correct, then the respondents are not entitled this year of their outgoing to use the farm dung for beans, seeing that the only corn crop exempted from the prohibition is wheat. But further, 'green crop of the preceding year' must be read as meaning the year which precedes the outgoing, which in this case is the year 1878. Such is my view of the law of the case. Some confusion has been introduced by way of a specialty from certain statements made on record in a previous action of removing between the parties, and by the terms of a joint minute under which that action was taken out of Court. But I have not sufficient materials before me to enable me to say how far, if at all, the present dispute is affected by these proceedings. As to the expediency of granting interim interdict, the result of refusing it would be that the incoming tenant would be deprived of manure for his turnip crop, a loss which it would be very difficult to estimate, while there is some authority for holding that on a clay soil such as that in question beans may be laid down without much manure if they follow near a manured crop; and I suppose it is possible for the respondents to prevent entire loss by the employment of some suitable artificial manure. The expediency, however, is pretty evenly balanced, and I proceed mainly in the course which I have adopted on the general ground first above indicated. J. C. T."

Act.—Duncan.——*Alt.*—Falconer.

SHERIFF COURT OF BANFFSHIRE.

Interim Sheriff-Substitute Watson.

MARRIED WOMEN AND THE SCHOOL BOARD ELECTORATE.

Right of married women to vote at election of School Board.—The interlocutor explains the circumstances of the case:—

"*Banff, 30th April* 1879.—The Sheriff-Substitute having heard parties' procurators, made avizandum with the productions and whole process, and considered the whole cause—Finds proof unnecessary, and, for the reasons stated in the subjoined note, refuses the prayer of the petition, and decerns: Finds the pursuer liable to the defenders in their expenses of process.

"George Watson.

"*Note.*—The pursuer in this case was one of six candidates in the election of a School Board for the parish of Grange, which took place on the 3rd April current. According to the return made by the defender, James Ewing, who was returning officer, the pursuer stood sixth on the list after the poll, and thus failed to obtain a seat. The other defender, Alexander M'Culloch, was fifth on the list. During the time of election it appears that a married woman, Margaret Wilson or Green, wife of James Green, merchant, Crossroads, Grange, presented herself as a voter; and that the returning officer refused to admit her, on the ground of want of qualification. The pursuer has raised the present action to have it found that the election of the defender M'Culloch is null and

void, and to have the defender Ewing ordained, as returning officer, to enter the pursuer's name on the roll of members of the said School Board in room of Mr. M'Culloch, on the ground that Mrs. Green's votes were improperly rejected by the returning officer, and that, had they been admitted, her five votes would have been given in favour of the pursuer, and would have turned the election in his favour. The petition concludes also for expenses against both defenders; but at closing the record the pursuer lodged a minute stating that in respect the defender M'Culloch had intimated his intention not to oppose the prayer of the petition except as regards expenses, he departed from the conclusion for expenses, and restricted his petition accordingly.

"The said Mrs. Green was married to her present husband on 24th December 1870. Before that she was a widow, her former husband's name being George Russell. The grounds on which the returning officer acted in refusing to admit her as a voter were two, as stated in the defences lodged by him, viz.: (1) That, being a married woman, Mrs. Green was legally incapable of voting; and (2) that her name was not entered on the valuation roll then applicable to the parish. Parties were heard on both these grounds of defence, and the case was argued with much ability on the part both of the pursuer and of the defender, the returning officer.

"The question whether married women have a right to vote at School Board elections is one which has already come up for judicial determination in different Sheriff Courts, but which cannot yet be regarded as settled. On the one hand, Sheriff Fraser (Dean of Faculty) has decided that married women entered as owners are not under any legal incapacity to vote. On the other hand, the contrary view has been acted on by more than one Sheriff-Substitute, and is supported by the opinion of Lord Rutherfurd Clark (given while Solicitor-General). See Sellar's 'Manual of the Education Acts,' 7th edit. pp. 158-160. The question must, therefore, be dealt with as an open one. The 14th section of the Education Act, 1872 (35 and 36 Vict. cap. 62), makes the Sheriff's determination in questions regarding School Board elections final; and it is an unfortunate result of this provision that every Sheriff is left to follow his own inclination without the guidance of any authoritative precedent, and that the practice in each Sheriffdom must vary according to the view taken by the Sheriff of the district.

"The common law as to the *status* of a married woman is clearly laid down by the institutional writers: 'Her person is in some sort sunk by the marriage, so that she cannot act for or by herself' (Erskine, Inst. B. i. t. 6, §19). 'The marriage operates in regard to the wife so as to sink her person in the eye of law. The husband and wife are one; and the unity of persons is so complete that the legal existence of the wife is said to be suspended during marriage, or at least is incorporated with, and consolidated in, that of her husband' (Fraser on Husband and Wife, 2nd edit. i. 507). Hence a married woman cannot be tutor or curator. She may, however, with consent of her husband, be a trustee (Stodart, 30th June, 1812, F. C.). In that case Lord Glenlee said it was fixed law that, 'if a man means to make a married woman tutor or curator, it is not in his power to do so. But it is quite a different matter to make her a trustee. In the one case he cannot go beyond the precise powers given by law; and I see many reasons why a man should not be allowed to do so, and think the rule a good and wise one; but in the case of a trustee a man may dispose of his property as he pleases. The trust depends altogether on his arbitrary and uncontrollable will.' The *ratio* of this distinction may serve to justify the right of married women to sit as members of School Boards, being appointed by the voice of the community; but it is not favourable to their right to vote at common law. The educational franchise being, like the Parliamentary and municipal franchises, a public function, it cannot be presumed without specific enactment that it was intended to be exercised by married women. By section 12 of the Education Act, 1872, it is declared that 'the electors shall consist of all persons, being of lawful age and not subject to any legal incapacity, whose names are entered in the latest

valuation roll applicable to the parish,' etc. Any person 'subject to any legal incapacity' (*i.e.* any incapacity at common law) is, therefore, not an elector under the Act. I am of opinion that the *status* of a married woman, under the curatory of a husband, as explained in the passages cited above, incapacitates her, at common law, from exercising such a function as voting at a School Board election; and therefore that a married woman cannot be an elector under the statute. It is true that the Act has been construed and generally acted on as conferring the educational franchise on unmarried women and widows. But the removal of the disqualification arising from sex by no means implies the removal of the disqualification arising from *status*. In an English case (*Reg.* v. *Harrald*, 22nd January 1872, L. R. 7 Q. B. 361) a similar question arose in regard to the construction of a statute which conferred on women a right to vote in municipal elections; and it was held that the Act had reference only to the disability of women by reason of sex, and had no reference to the disability by reason of *status* of coverture. The English Act in question (32 and 33 Vict. c. 55, sec. 9) provides that 'wherever words occur which import the masculine gender the same shall be held to include females, for all purposes connected with and having reference to the right to vote in the election of councillors,' etc. In the case cited, Lord Chief-Justice Cockburn observed: 'It is quite certain that by the common law a married woman's status was so entirely merged in that of her husband that she was incapable of exercising almost all public functions. It was thought to be a hardship that when women bore their share of public burdens in respect of the occupation of property, they should not also share the rights to the municipal franchise and be represented; and it was thought that spinsters and unmarried women ought to be allowed to exercise these rights. The 32 and 33 Vict. c. 55, accordingly gave effect to these views, and enacted that, wherever men were entitled to vote, women, being in the same situation, should thereafter be entitled; but this only referred to women possessed of the necessary qualification in respect of property and the payment of rates, and I cannot believe that it was intended to alter the *status* of married women. It seems quite clear that this statute had not married women in its contemplation.' On similar grounds, I think that the existence of a right in unmarried women to vote under the Education Act does not imply that the right was also intended to be conferred on married women. For these reasons, I am of opinion that the returning officer acted rightly in refusing to receive the votes of Mrs. Green on the ground that, being a married woman under the curatory of her husband, she was legally incapable of voting.

"This being so, the present petition must be refused, and it is of little consequence to consider the second objection taken by the returning officer to Mrs. Green's qualification, viz. that her name was not entered on the valuation roll. It appears that Mrs. Green claimed to vote in virtue of an entry under the name 'Widow George Russell,' tenant of the croft of Paithnick. Widow Russell was the name by which Mrs. Green was known before her present marriage, and no suggestion was made that the entry applied to any other individual. The question being therefore merely one of identity, if this objection had stood alone, I should have been disposed to hold that Mrs. Green's votes should not have been rejected for want of accurate entry in the valuation roll.

"The 14th section of the Education Act appears to contemplate a summary mode of procedure for determining questions such as the present, by which parties may be heard before the Sheriff without written pleadings. In this case, however, the pursuer adopted the form of petition applicable to an ordinary action and concluded for expenses against both defenders, who were therefore obliged to lodge written defences. I have therefore followed the ordinary course in finding the pursuer liable to both defenders in the expenses of the action. In the view which I have taken of the case, it does not appear to be necessary to notice further, at this stage, the minute lodged for the pursuer departing from his conclusion for expenses, nor the answer thereto lodged for defender M'Culloch. G. W."

t.—Fraser.——*Alt.*—Hossack.——*Alt.*—Watt.

BANFF SMALL DEBT COURT.

Sheriff SCOTT MONCRIEFF.

STUART *v.* STUART'S TRUSTEE.

Bankruptcy—Trustee.—An action against a trustee in a sequestrated estate for a debt incurred by the bankrupt, dismissed as incompetent pending the sequestration. The following judgment was pronounced:—

"*Banff, May 20th,* 1879.—In this case the defender is sued as trustee on the sequestrated estate of John Stuart, and the account attached to the summons sets forth the sum of £7, under the date November 22, 1878. 'to wages' as domestic servant at Mill of Crannah for the half-year from Whitsunday 1878 to this date, for which you as trustee on the estate of John Stuart, who was sequestrated on the 24th December 1878, are liable. It is not alleged that the defender has incurred any individual responsibility for this sum, and it seems clear that what is sought is merely a decree against him as trustee. I am clearly of opinion that the pursuer cannot obtain this pending the sequestration. She has another remedy. She can lodge her claim, and have it disposed of in the ordinary way by the defender as trustee. He has a certain duty imposed by statute to perform in the interests of all the creditors, and if he fails to perform that duty, they have their remedy. Now, were a decree to be pronounced against him here, it could only be against him as an individual. This seems clear from the case of *Jaffrey* v. *Gordon & Waddell* (February 10, 1831, 9 Sh. 416). In that case two servants obtained decrees in the Small Debt Court against Jaffrey, trustee on a sequestrated estate. The defender suspended on the ground that these decrees could only apply to him *qua* trustee, and that he had no funds. It was contended on the other hand that the actions must have been raised against him as individually liable, otherwise they would have been incompetent and unmeaning, as claims might have been made in the sequestration in common form. And this was the view which the Court of Session took. Lord Balgray said, 'The Sheriff never meant them to be decreed against the trust estate. The thing is impossible *sua natura.* He must have meant them against Jaffrey personally.' And Lord Craigie observed, 'The decrees being in the Sheriff Small Debt Court, it is quite clear that a personal decerniture against Jaffrey must have been meant.' In the more recent case of *Crichton's Trustee* v. *Stewart* (March 31, 1866, 4 Macph. 689), the trustee under a sequestration was charged to make payment of a debt for which the charger had obtained decree of constitution against the bankrupt estate. Such a charge was held incompetent during the dependence of the sequestration. Lord Curriehill was of opinion 'that the trustee is not only not bound to comply with the charge, but that he is not entitled to do so. As the trustee on a sequestrated estate he cannot pay one creditor in preference to another. He is not entitled to pay any one except in the course of the sequestration.' And Lord Deas concurred, adding that 'the whole object of the Bankrupt Statute would be defeated if this could be done.'"

Act.—Forbes.——*Alt.*—Watt.

Notes of English, American, and Colonial Cases.

CRIMINAL INFORMATION.—*Responsibility of proprietor of newspaper for libel inserted without his authority, consent, or knowledge—Liability for act of editor.*—On the trial of a criminal information for libel, it was proved that defendants,

proprietors of a newspaper, had appointed an editor to undertake the literary management of the paper, and given him general authority and discretion as to the insertion of articles therein, and that the article in question was inserted by him without their knowledge, and without any specific authority or consent from them. The judge left to the jury the question whether the general authority to the editor included an authority to publish the libel, and a jury found defendants guilty. Upon motion for a new trial on the ground of misdirection, and that the verdict was against evidence,—*Held*, by Cockburn, L.C.J., and Lush, J. (*dissentiente* Mellor, J.), that, inasmuch as the "authority" mentioned in section 7 of 6 & 7 Vict. c. 96, means authority to publish the libel, and as the general authority to an editor to conduct a newspaper must, in the absence of anything to give it a different character, be taken to mean authority to conduct it according to law, the direction of the judge was defective in not so explaining the law to the jury as bearing on the question left to them; and that the general authority given to the editor to use his discretion in the insertion of articles was not of itself sufficient to make defendants criminally responsible as being evidence that the publication had been made with their authority, consent, or knowledge within section 7 of 6 & 7 Vict. c. 96.—*R.* v. *Holbrook*, 48 L. J. Rep. Q.B. 113.

SALVAGE.—*Ship of war belonging to a foreign government—Immunity from arrest.*—A ship of war belonging to and duly commissioned by a foreign government is not within the jurisdiction of a British municipal tribunal, and a warrant of arrest in an action of salvage *in rem* cannot be issued against such ship out of the Admiralty Division, nor against the cargo on board, even though it is the property of private persons, if the goods in question are under the charge of the government for public purposes.—*The Constitution*, 48 L. J. Rep. P., D. & A. 13.

PARTNERS.—*Dissolution of partnership—Assignment of goodwill to one partner—Name of firm—Right to use name of retiring partner.*—The assignment of the goodwill of a business includes the exclusive right, as against the assignor, to continue the use of the name and style of the firm under which the business has been carried on; and this rule applies although the name of the assignor is the name or part of the name of the firm.—*Levy* v. *Walker* (App.), 48 L. J. Rep. Chanc. 273.

When a partner retires from a firm the *onus* is on him to give notice of the fact to all persons with whom the firm have had dealings; and if he do not, he will remain liable for the debts of the firm.—*Ibid.*

Dictum of Cairns, L.C., in *Maxwell* v. *Hogg* (36 Law J. Rep. Chanc. 433; s. c. Law Rep. 2 Chanc. 307), that a man has a right of property in his name, dissented from.—*Ibid.*

NEGLIGENCE.—*Duty of owner of market—Dangerous erection in market-place.*—Defendants, owners of a market for the sale of cattle, had, some three years before action, erected some railings round a statue in the street of the town where the market was held, and near to the site which plaintiff, who was in the habit of bringing cattle to the market, occupied and paid a toll for. A cow of plaintiff's was killed in trying to jump the railings, and in an action brought against defendants to recover damages for her loss, the jury found that the railings were of insufficient height:—*Held*, by Lush, J., on further consideration, that plaintiff was entitled to recover; on the ground that the owners of the market were under an obligation to keep the market-place free from danger to those who lawfully frequented it; and that by erecting the railings of insufficient height they had been guilty of a misfeasance, resulting in damage to plaintiff, who was not a mere licensee of a particular site, but entitled to use the whole of the market-place subject to the regulations and control of the owners.—*Lax* v. *The Mayor, etc., of Darlington*, 48 L. J. Rep. Q.B. 143.

SOLICITOR AND CLIENT.—*Reopening settled accounts—Taxation of bills of costs more than a year after payment—"Special circumstances"—Evidence—Admitted documents.*—W., a lady advanced in life, employed R., a solicitor, to represent her interests in two suits. R. was also solicitor for all the other parties in both suits. The suits were compromised, and a deed was executed by which, amongst other things, W. covenanted with all the other parties to the two suits to pay all their costs in both suits. An account was then drawn up and settled between W. and R., in and by which all these costs were included and paid. Two years afterwards W. brought an action against R. to have the settled accounts reopened, and the bills of costs referred to taxation:—*Held*, affirming the decision of Malins, V.C., that W. was entitled to relief on the ground—first, of undue influence; secondly, that many of the charges were exorbitant, and much of the business charged for was unnecessary and improper. *Held*, further, that as W. had no independent professional advice when she agreed to the compromise, R. had no equity against her for payment of the costs of all his other clients, parties to the suits.—*Watson* v. *Rodwell* (App.), 48 L. J. Rep. Chanc. 209.

The admission of documents as evidence in an action does not make them evidence in the action unless they are read or put in and marked by the registrar at the trial.—*Ibid.*

COLLISION AT SEA.—*Regulations for preventing collisions at sea—Lights.*—If a vessel infringes the regulations for preventing collisions at sea in the slightest degree she will, under 36 & 37 Vict. c. 85, s. 17, be held to blame for a collision which takes place during the time of such infringement, if it could by any possibility have caused such collision, and even though the infringement was not the actual cause of the collision. The fact that the infringement is partially caused in consequence of obedience to the instructions of a surveyor of the Board of Trade is not sufficient to make a departure from the regulations necessary, within the meaning of 36 & 37 Vict. c. 85, s. 17.—*The Tirzah*, 48 L. J. Rep. P., D. & A. 15.

COMPANY.—*Payment of interest out of capital—Personal liability of directors.*—Directors of a company, pursuant to a resolution of shareholders, paid interest on the fully paid-up capital. This interest was in fact paid out of capital, there having been no profits of the business of the company. But such payments were, from time to time, approved of at the annual general meetings of the company:—*Held*, that the directors had been guilty of misfeasance within section 165 of the Companies Act, 1862, and were personally liable to repay not only the interest which they themselves had received, but the interest paid to the shareholders, during the time they were respectively directors.—*Re The National Funds Assur. Co.*, 48 L. J. Rep. Chanc. 163.

COPYRIGHT.—*Title of book—Book out of print for several years.*—The title of a book is part of the book, and is as much a subject of copyright as the book itself.—*Weldon* v. *Dicks*, 48 L. J. Rep. Chanc.

The proprietor of copyright in a book does not lose his right to republish the book, at any time during the continuance of the copyright, although the book may have been out of print for several years.—*Ibid.*

COMPANY.—*Allotment of Shares—Contract when complete—Letter sent by post but not received.*—Where an application for shares in a company is sent in the usual form, with an express or implied statement that the letter of allotment may be sent to the applicant by post, then the moment the letter of allotment is posted, addressed to the applicant according to his address given in his letter of application, the contract to take the shares is complete, and it is immaterial whether such letter of allotment ever reaches the applicant or not.—*The Household Fire and Carriage Accident Insur. Co. (Lim.)* v. *Grant*, 48 L. J. Rep. C.P. 219.

RAILWAY COMPANY.—*Bye-law—Travelling without a ticket—Action for fare from place whence train originally started.*—By 8 Vict. c. 20, s. 103, it is provided that if any person travel in a carriage of the company without having previously paid his fare, and with intent to avoid payment thereof, he shall forfeit a sum not exceeding forty shillings. By section 108 the company may make regulations for regulating the travelling upon the railway. By section 109 the company are empowered to make bye-laws, provided such be not repugnant to the provisions of the Act. A railway company made a bye-law, which provided that any person travelling without a ticket shall be required to pay the fare from the station whence the train originally started to the end of his journey, and under this bye-law the company sued in the County Court, for the amount of the fare from the place whence the train originally started, a passenger who had, without any intention to defraud, entered a train at an intermediate station, and travelled therein without a ticket:—*Held* (affirming the judgment of the Common Pleas Division, 47 L. J. Rep. C.P. 634), that the action could not be maintained, that a debt could not thus be created, and that the amount if claimed as a penalty could not thus be recovered.—*London, Brighton, and South Coast Rail. Co.* v. *Watson* (App.), 48 L. J. Rep. C.P. 316.

COMPANY.—*Shares fully paid up—Non-registration of contract—Transferee without notice—Estoppel.*—The 25th section of the Companies Act, 1867, in no way alters the law as to the evidence of payment for shares, and the certificate of the company that shares are fully paid up is an absolute protection to a *bona fide* transferee from liability to calls, notwithstanding that nothing has been paid on them, and no contract for their issue, otherwise than subject to the payment of the whole amount in cash, has been registered.—*Burkinshaw* v. *Nicholls* (H.L.) 48 L. J. Rep. Chanc. 179.

SHIPPING.—*Bill of lading—Liability of consignee named in the bill of lading—Delivery to be taken within reasonable time.*—Where there is no express stipulation in a bill of lading it is an implied term of the contract contained in it that the consignee named in the bill of lading, or his assigns, will take delivery of the goods within a reasonable time, and the person to whom the property in the goods has passed by reason of such consignment, is by virtue of the Bills of Lading Act, 1855 (18 and 19 Vict. c. 111), s. 1, subject to the liability so to take them.—*Fowler* v. *Knoop* (App.) 48 L. J. Rep. Q.B. 333.

Where the charterers and the shippers are the same persons, such contract will still be implied in the bill of lading, notwithstanding the existence of an express stipulation in the charter-party between the charterers and the shipowner in reference to the same matter.

MARINE INSURANCE.—*Insurance to cover loss of freight—Mode of calculating underwriter's liability.*—Plaintiffs, shipowners, entered into a charter-party by which they were to receive freight for their ship at a named rate. There was also a provision, that if any of the cargo was sea-damaged, the freight on such portion should be only two-thirds of the named rate. Plaintiffs insured with defendants for a sum "to cover only one-third loss of freight in consequence of sea-damage as per charter-party." Part of the cargo was sea-damaged, and plaintiffs having only received two-thirds freight on that portion sued defendants for the difference between the sum received and the full freight on that part of the cargo:—*Held*, that the insurance was made to cover the difference between the full freight which might be earned, and the amount actually received; and therefore that the plaintiffs were entitled to recover the full amount claimed, and not merely such a portion of the loss as the sum for which defendants subscribed the policy bore to the whole value of the freight which might have been earned.—*Griffiths* v. *Bramley-Moore* (App.), 48 L. J. Rep. Q.B. 201.

PATENT.—*Prolongation—Rules in patent cases—Notice of objections.*—Rule VI. of the Rules in Patent Cases provides that "parties served with petitions shall lodge in the Council office, within a fortnight after such service, notice of the grounds of their objections to the granting of the prayer of such petition:"—*Held*, that such notice need not state the particulars of such objections.—*In re Ball's Patent*, 48 L. J. Rep. P.C. 24.

Section 41 of the 15 and 16 Vict. c. 83, does not apply to proceedings in the Privy Council.—*Ibid.*

RAILWAY.—*Right of way—Grant ultra vires—Rights of railway companies to deal with land, and not being "superfluous land" or land taken for "extraordinary" purposes.*—In the absence of express enactment a railway company incorporated by special Act has no power to alienate, either for value or without value, any portion of the land acquired by them for the purposes of their undertaking, and not being "superfluous lands" or lands acquired for "extraordinary" purposes.—*Mulliner* v. *The Midland Rail. Co.*, 48 L. J. Rep. Chanc. 258.

The A. Railway Company, having the usual powers under their special Acts, and also power to enter into agreements with the defendant railway company for the user and working by them of the line, acquired lands under their special Acts, and constructed their railway so that a station and the line of railway was partly built on arches. The A. Company granted for value to their contractors certain superfluous land on one side of the line, and also an unlimited right of way, not being a way of necessity, through one of the arches to this superfluous land. The contractors granted for value the land, with the right of way, to plaintiff. The railway since its opening had been worked by the defendant company, and the latter now required the exclusive use of the archway for the purposes of their traffic, and claimed to close up the same entirely, so as to interrupt plaintiff's right of way:—*Held*, that the land under the archway was part of the railway and works, that the A. Company had no power to grant the right of way in question through or over land actually used by them for the purposes of their undertaking, that the grant was invalid, and that the defendant company was entitled to the exclusive use of the arch for the purposes of their traffic. *Held*, also, that the fact of the line being worked by the defendant company made no difference to plaintiff's rights, and that he, having purchased with notice of the defendant's company's rights, was not entitled to any relief, and an action by him to restrain the interference by the defendant company with his alleged right of way was accordingly dismissed with costs.—*Ibid.*

HIGHWAY.—*Person preceding locomotive on foot.*—The 3rd section of 28 & 29 Vict. c. 83, which, as amended by 41 & 42 Vict. c. 77, s. 29, requires one of the three persons employed to conduct a steam locomotive on a public highway to precede such locomotive on foot by twenty yards, and in case of need to assist horses or carriages drawn by horses, in passing the same, is not the less complied with because such person, whilst preceding the locomotive on foot, leads a horse and cart of his own.—*Davis* v. *Browne*, 48 L. J. Rep. M.C. 92.

FALSE REPRESENTATION.—*Sale of animals in public market—Implied representation of freedom from infectious disease.*—A man who sends animals to market does not thereby impliedly represent to a purchaser that they are not, so far as he knows, suffering from infectious disease, at all events where they are sold subject to an express condition that no warranty will be given.—*Ward* v. *Hobbs* (H. L.), 48 L. J. Rep. Q.B. 281.

Purchasers are not within the purview of the Contagious Diseases Animals Act, section 57, and cannot in consequence maintain an action upon a violation of the duty imposed by that section.—*Ibid.*

Whether the owner of other animals infected in the market could recover damages for their loss—*Quære.*—*Ibid.*

WASTE.—*Quarry.*—If the owner of an estate has worked a quarry for profit, a termor may continue to work it, and there is no difference in this respect between a mine and a quarry. *Secus*, where materials have merely been dug from the quarry for the purpose of building or repairing houses on the estate.—*Elias* v. *Griffith* (App.), 48 L. J. Rep. Chanc. 203.

MUNICIPAL ELECTION.—*Infringement of secrecy—Communication—Means of knowing.*—The 4th section of the Ballot Act, 1872 (35 & 36 Vict. c. 83), makes it an offence punishable on summary conviction for an agent at a polling station to communicate before the poll is closed to any person any information as to the name or number on the register of voters of any elector who has applied for a ballot paper or voted at that station :—*Held*, that in order to justify a conviction of such an offence under that section, it must be shown that the information reached the mind of the person to whom it is communicated, and it is not enough to show that such person had the means of knowing it. Therefore, where the evidence was only that the agent had during a municipal election gone from the polling station to the committee room of the candidate for whom he was agent, and had there left his part of the burgess roll on which he had put a mark against the name of every voter who had obtained a ballot paper, but did not show that any one there had looked into such part, or had in fact obtained any information from it, it was held there was no evidence on which a magistrate ought to convict the agent under the said 4th section.—*Stannanought* v. *Hazeldine*, 48 L. J. Rep. M.C. 89.

ARBITRATION.—*Want of care and skill in certifying under builder's contract.*—Statement of claim set out an agreement under which plaintiff contracted with a company to build for them a hall whereof defendant was employed as architect; defendant was to be allowed to order additions and deductions, the amount of which were to be ascertained by him in a certain manner; all matters of dispute were to be left to defendant, and his decision was to be final; plaintiff was to be paid on the certificate of defendant. The statement of claim then alleged—that the work was done and the certificate given, but that defendant did not use due care and skill in ascertaining the amounts to be paid by the company to the plaintiff, and neglected and refused to ascertain the amount of the said additions and deductions in the manner aforesaid, and knowingly or negligently certified for a much less sum than was, in fact, the net balance payable ; and further—that defendant refused to reconsider the said certificate and allow plaintiff to point out to him the said errors in the bill of quantities :—*Held*, that no cause of action against defendant was disclosed by the above statement of claim ; defendant's duties involving the exercise of judgment and skill.—*Stevenson* v. *Watson*, 48 L. J. Rep. C.P. 318.

Per Lord Coleridge, C.J.—Had the defendant's duties been merely ministerial, the action would have been maintainable.—*Ibid.*

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MINERAL RENT.

THE most recent and most interesting decision on the subject of mineral rent is undoubtedly that of *Allan's Trustees* v. *Duke of Hamilton*, January 17, 1878. In that case it was held unanimously by the Second Division, altering the judgment of Lord Adam, that in calculating the amount of year's rent due to the superior by a singular successor in name of composition, or for the purpose of redemption under sec. 15 of the Conveyancing Act of 1874, the mineral rent under current leases must be taken into account. The principle of the decision appears to be that the superior's rights must be determined by considering him to have entered into possession of the feu in virtue of the conclusions to that effect which used to form a part (though seldom a practically important part) of the now obsolete declarator of non-entry. This was indeed also the view of Lord Adam, but he was so much impressed by the absence of evidence of this serious claim having been previously made by superiors that he came to the conclusion, which he admitted to be inconsistent with the principle of the legal relations in question, that, as there was no positive authority (except that of reason) for the claim, it must be rejected. The argument addressed to the Court appears to have ranged over many interesting departments of the law, more or less connected with the subject of debate. To some of these we shall immediately refer. In the meantime it may be noticed in passing that it appears to have been the opinion of Lord Justice-Clerk Moncreiff that the question was really decided in favour of the superior by Wellwood's case (July 12, 1848, 10 D. 1680), followed in *Douglas* v. *Scott* (December 17, 1869, 8 Macph. 360). But the case of Allan's Trustees not merely decided that mineral rent must be included in composition, it also afforded a rule for computing the amount very similar to that laid down with respect to salmon-fishing in *Magistrates of Inverness* v. *Duff* (February 27, 1771, M. 9300), where an average of seven years' rents preceding the date of entry was taken. As Lord Gifford said in Allan's Trustees, "Mineral property has a great many peculiarities. The minerals may be so

limited in quantity that they may be very soon wrought out. The winning of them is attended with great risk and great expense. Their working may suddenly be rendered impossible, or impossible to profit, by faults, by flooding, or by other contingencies; and, practically, mineral properties are only worth a limited number of years' purchase, far inferior to the value of lands with a corresponding land rent. It would not be equitable, therefore, in many cases to give the superior the full mineral rent or proceeds which happen to be made good in the year of non-entry. That might possibly be to give him a large proportion of the whole value of the minerals, for minerals are sometimes wrought out in a very few years; and therefore some equitable rule must be adopted for ascertaining what is the true and permanent annual and constant value of the minerals as distinguished from the mere accidental output in any one year." What the Court did in Allan's Trustees, accordingly, was to find out what number of years' purchase the minerals were fairly worth, "taking into view the character of the workings and the risks and expenses attending the same." Four *per cent.* on the capital value so reached was then taken as the constant annual value. There can hardly be two opinions about the justice of this decision, if what the purchaser has to pay to the superior is a year's rent in the sense of the permanent, not the casual, returns of the year of entry. The language of the statute which originally admitted appraisers, however, is "a year's rent as the land is set for the time," which would rather exclude calculation, either prospective or retrospective; and certainly, if the amount of the money claims were to be tested by the principle on which the Court declared minerals to be subject to composition, viz. that of the superior entering to possession, there can be no doubt that the *interim dominus* would be entitled to whatever fixed rent or lordships he might find payable.

The rights in minerals of a tercer and a liferenter are two closely related questions. The second is often merged in the construction of a settlement which includes mineral estate and confers a liferent, either total or partial. The intention of the settler must then be ascertained. The first question relates to the simplest of legal liferents, and yet the law does not seem to stand in a clear or satisfactory position. The general principle is that the widow succeeds to the extent of one-third to the liferent of the subjects in which her husband was beneficially infeft. It would, therefore, require a strong decision, or perhaps a *series rerum judicatarum*, to establish an exception to the simple and intelligible terms of this rule; especially would this be required to exclude the widow's claim from the whole enjoyment of a subject, admitting of and often receiving separate infeftment, which might indeed constitute the entire heritable estate of her deceased husband. Lord Jeffrey has said in Wellwood's case that terce is an antiquated and unreasonable provision. It is, no doubt, an ancient, as it is also a humane

provision of the law; and we observe that a proposal has recently been made to extend and equalize the reciprocal indefeasible rights of spouses *ab intestato*. But we ought to beware against representing the law as more unreasonable than it really is. The old and imperfectly reported cases generally cited to establish the exception of minerals from the claim of terce are scarcely sufficient for that purpose. The date of the case *Laird of Lamington* v. *His Mother* is 1628, and it is thus reported in the Auchinleck MS. and by Kerse: "The lady falls[1] not a terce of feu-duties, nor of coal-heughs but to her own use." The longer reports by Spottiswoode and Durie do indeed state that the Court found that terce was due only of lands above ground, and that this lady had no right to the profits of anything under ground, but in so far as was needful for her, and not to any more of any part of the commodity made by the heritor thereof. The distinction seems at first sight so purely fantastical that one seeks for an explanation of the decision. This may perhaps be found in the fact, which appears from the report, that there was a question whether the lady was entitled to break the ground to work coal and sell it to others. If the claim really made by the tercer was to open mines, it is quite intelligible that this should have been refused by the Court as beyond the reasonable power of administration belonging to one who has only a temporary use of a portion of an estate, the remainder being in the possession of the heritor. The next case generally referred to in support of the exemption of minerals from terce is that of Preston in 1677 (M. 8242). At the date of the marriage contract in that case there was, no doubt, a going coal pit, "sold to the country," and not merely raised by the heritor "for his own fire." The claim made, however, was a peculiar one. The widow had a limited right to an annual rent of 1200 merks out of the lands, with an option to possess the lands. This option she desired to use because the average output of the pit, which she wished to take into her own hands, was apparently greater than her annual rent. It was argued, on the authority of a case reported by Craig, which we shall immediately refer to, that all tercers had right to coal. But the decision of the Court was that the lady had only a security for her annual rent, and that as she was not a conjunct fiar, or infeft in the lands, she had no right to the coal. This is obviously not a decision on the law of terce. In *Belschier* v. *Moffat* (June 30, 1779, M. 15863) it is recognised that at that date there was only one decision viz. that of Lamington) apparently in favour of the exemption of coal from terce; a decision, no doubt, cited by Lord Bankton and Prof. Bell, but ignored by Lord Stair. The judgment of the Court was that "Mrs. Belschier's terce does not affect the rents or profits of the coal, but only those of the lands and teinds in which her husband died infeft." The case, however, was a peculiar one. There was a competition of creditors on the rents, and the question of terce had

[1] *Sic* in Morison's Dict. *voce* "Terce."

in the first place been the subject of compromise with a creditor who was infeft in the minerals under redemption.

The principle of these decisions is discussed by Craig in the sub-title "de carbonibus et carbonariis" of his title "quid juris vassallus ex investitura consequatur." The case of Lamington was not decided when he wrote, and his observations are directed to a case of Seton, in which a widow had claimed terce out of coals, "exeo quod fructus carbonarii essent amplissimi." The heritor replied that coals, like *silvæ cæduæ*, were not fruits but *partes soli*. The result is stated by Craig thus: "Vicit tamen in eo judicio mater, et ei tertia fructuum carbonum venditorum attributa, *non* quatenus ad ejus usum tantum necessarium erat, ut in silvis cæduis jura præcipiunt." Craig undoubtedly dissents from this decision, and expresses his own opinion that neither tercer nor conjunct fiar should have any interest in minerals beyond what is required for necessary use. He proceeds on the law which was unsuccessfully pleaded in Seton's case, on the deterioration or diminution of the subject by the consumption of coal, and on the danger of exhaustion of the minerals of ward-lands by wardatars: "immissis multis effossoribus et multiplicata venditione." On the last point a reference is apparently made to the Acts 3 Jas. IV. c. 25, and 4 Jas. V. c. 15, which imposed the *cautio usufructurius* on superiors of ward lands and their donatars, and also on liferenters and conjunct fiars: "in eadem bonitate et qualitate restituere." He also deals with the cases of a sale under *pactum de retrovendendo*, accompanied or unaccompanied by a lease to endure for a period after the re-purchase, *i.e.* a wadset under reversion: cases which could not occur in modern practice, and which Craig decides against the claim to work minerals, because there is an implied obligation of restitution in the same good condition as when possession is taken. A similar question might arise with reference to the rights of a bondholder in possession. But even this doctrine Craig limits by reference to the state of possession at the time of the original sale in security; for if mines are thus being worked, it has probably been in the contemplation of the person who makes the purchase or advance that the workings, which are patent to both parties, may be continued in the same manner, the owner making no stipulation on the subject.

Stair (ii. 3, 74), who wrote after the decision of Lamington's case, notices at some length this discussion by Craig. He says that in Seton's case the "coal-work was constantly going for sale in the defunct's time;" and states his own view of the law to be, that where the heritor has used either wood or coal more as fruits than as parts, the tercer may do the same; "if a coal be a constant-going coal without apparent hazard of exhausting it, it is like conjunct fiars, tercers, or donatars will not be excluded therefrom, not exceeding the measure and method accustomed by the fiar, but otherwise coal is to be considered only as a part." This

principle, of the owner treating coal as fruits, was well illustrated in the leading case of Waddell (January 21, 1812, F.C.), where a general liferent of heritable and moveable property, tacks, etc., was held to include the rents of minerals under lease for 999 years, with a power of abandonment on their being worked out or becoming unworkable. This was of course a tolerably clear question of intention, but the observations made by some of the Judges are applicable to the general case. Thus Lord Craigie said, "It appears to me that Lord Stair is right in principle in saying that the proprietor who grants a case of mines and minerals, considers the minerals rather as fruits than as *partes soli*." Lord Glenlee said, "If a liferent of coal is given, it is capable of being used to a certain extent without the utter destruction of the subject; and if it is set in tack to a man who pays rent for it, that is a mode of using the subject without necessarily exhausting it, and having been so set, it is the only mode of using it." This no doubt refers to a gift by special words, but Lord Gillies, in considering the case as one of pure liferent estate (which may be said to be weaker than the case of pure terce), observes, "In the first place, suppose there was no danger of the minerals being exhausted, you have an express authority in Stair, and no contrary authority but the case of Belschier, and we are not so acquainted with the circumstances of that as to entitle us to set it up against Lord Stair." In the same way in Wellwood's case (July 12, 1848), which, as we have pointed out, was appealed to by Lord Justice-Clerk Moncreiff in Allan's Trustees as settling the liability of mineral rent to composition, Lord Mackenzie said, "If the petitioner's argument founded on the coal being *pars soli* were good, it would come to this, that the working of the coal was a contravention of the entail. No doubt every pound of coal excavated is a piece of the entailed estate which may be said to be sold. But such a view as that is merely theoretical, and gives place to common sense and practical utility. Accordingly coals, quarries, and mines on entailed estates have always been in use to be let and worked. If it were otherwise, to entail a coal estate would be to extinguish it." And Lord Fullerton in that case, as well as Lord Justice-Clerk Moncreiff in Allan's Trustees (where the authorities for the exemption of minerals from terce seem to have been seriously challenged), said that the decisions relating to terce would not now be repeated. It was not necessary to say in either case whether they were still to be regarded as law. They are obviously in direct conflict with the principles on which Wellwood's case was decided. It must be admitted, however, that effect is given to them by Professor Bell (Comm. i. 57, and 2 Ill. 140). He also states the general principle with regard to all liferents, that while the liferenter may reap the fruits natural and industrial, he may not destroy or alienate part of the subject itself; "and so as minerals and coal are properly a part of the subject, not regenerating like fruits, a liferenter has no right to them without

a special grant, even where they are opened and in a course of being worked. But though this be the general rule, yet, wherever the minerals are let on lease, and it is plainly the intention of the granter of a liferent that it should include the rents, this intention will be effectual. Liferenters may take coal or stone or timber from going mines, quarries, and *silvæ cæduæ* for the use of the estate under liferent." This is very much the doctrine of Erskine, who says, "Whatever is *pars soli*, part of the fee itself, cannot fall under the right of liferent. Coal, freestone, limestone, minerals of all kinds, etc., are indubitably *partes soli* (though quarries are said by the Roman lawyer to grow again after they are wrought in certain parts of Asia Minor); no liferenter, therefore, has a right to those, insomuch that though a colliery has been opened by the proprietor previously to the commencement of the liferent, the liferenter cannot continue it without an express right" (for this he refers to Preston and an unreported case of Roseburn). "Nay, though the privilege of coal should be expressed, the liferenter cannot exceed the measure formerly accustomed by the proprietor, either as to the number of colliers or quantity of coal to be brought up from the pit or shaft. Yet tercers, whose right, constituted by the law itself, does not admit of being limited or extended by writing, are allowed to bring up such a quantity of coal as is necessary for their family, if the colliery has been opened before the death of the husband." For this the authority cited is the case of Lamington. A more liberal doctrine has since been laid down, with reference at least to locality lands, in *Duke of Roxburghe* v. *Duchess* (January 19, 1816, F. C.), where it was held that the Duchess was entitled to work lime for the use of such lands, and to let the lime for that purpose, and that she was entitled to this use of the lime, although the lime quarry was not open when she succeeded to the locality, but was opened by herself.

The case of *Guild* (June 29, 1872, 10 Macph. 911) arose upon the construction of a settlement conveying the trustee's whole means (which mainly consisted of a clay-field) to certain parties in liferent and others in fee. It was held there that the liferent included the rents of the clay-field, although the fiars offered to allow the interest on the capitalized value of the clay rents. Like the case of Waddell, this was of course a question of what was meant by words used in a general settlement. In delivering judgment, Lord Justice-Clerk Moncreiff observed: "The general rule that the right to work coal or quarries does not pass with such legal liferent as terce, or with localities in lieu of terce, may be held to be settled in our law, although the authorities are meagre, and our earlier writers, Craig and Stair, do not lay down the law so stringently. Stair rather seems to favour the liferenter's right when the minerals were in course of being worked by the granter, and there was no danger of exhaustion. There is also a text in the civil law favourable to the right of a usufructuary to work mines which had been opened

and worked by the father of the family. But probably the cases of Preston and the Duchess of Roxburghe may be held to decide that in such circumstances the liferenter has only a usufruct, and cannot appropriate the produce of mineral workings as being a diminution of the capital or substance of the land." This seems to be an under-statement of the law contained in Stair and Craig upon the subject; and it certainly proceeds too much on the cases of Preston and Roxburghe, both of which were strongly marked by specialties; the one relating to the security given for a definite annual rent, and the other to a provision limited by a signed rental, from which the mineral subjects were excluded. The Roman text alluded to is, however, of a very comprehensive and authoritative kind. It is in these terms: "Inde est quæsitum an lapidicinas, vel cretifodinas, vel arenifodinas ipse" (*i.e.* usufructuarius) "instituere possit? Et ego puto etiam ipsum instituere posse, si non agri partem necessariam huic rei occupaturus est. Proinde venas quoque lapidicinarum et hujusmodi metallorum inquirere poterit: ergo et auri et argenti et sulphuris et æris et ferri et cæterorum fodinas, vel quas paterfamilias instituit, exercere poterit, vel ipse instituere, si nihil agriculturæ nocebit. Et si forte in hoc, quod instituit, plus reditus sit quam in vineis vel arbustis, vel olivetis, quæ fuerunt, forsitan etiam hæc dejicere poterit, siquidem ei permittitur meliorare proprietatem." It is evident that this liberal doctrine of Ulpian gives no countenance to the positive restrictions placed upon liferents by the law of Scotland. And indeed a wider view of that law seems to have been taken by the Court in deciding the case of Wardlaw (January 23, 1875, 2 Rettie, 368). Lord Moncreiff refers to the case of Seton, as contradicting the opinion of Craig, and adopts the principle stated by Lord Stair, distinguishing between unwrought minerals as *partes soli* and minerals separated into a rent-yielding subject by the execution of a lease. The general presumption is stated to be "that where the fiar of an estate containing coal-workings which have been let under lease conveys a liferent of that estate, he must be presumed to give the right to those mineral rents which he himself had treated as the fruits of the heritable subject, unless the reverse is established by expression or presumption of contrary intention." To the application of this principle there were just two limits, the exhaustion of the minerals and the method of working followed by the heritor or truster. The settlement in Wardlaw's case was of one-third *pro indiviso* of an estate to persons in liferent and fee respectively; and the Court not merely sustained the claim of the liferenter to the mineral rents, but sanctioned the granting of new mineral leases by the liferenter.

Several questions have occurred with reference to mineral rents derived from entailed estate. In the first place, the Bredisholme case, *Muirhead* v. *Young* (13th June 1855, 17 D. 875), makes it quite clear that the heir in possession is entitled to work minerals,

even where it is alleged that they are approaching exhaustion. The main objections stated there to a lease granted by the heir within the powers of the Rosebery Act as regards duration, were that there was no lordship stipulated, and there was unlimited power of subletting. The Court thought, that looking to the history of the mineral field and the circumstances in which the lease was granted, the rent was not inadequate in a legal sense; and they applied the principle laid down by the Lord Chancellor in the Tinwald case (6 Pat. 551), that "there must be some unfairness, some fraud, or some gross culpable negligence operating as mischievously as fraud would operate, before you can undertake to say leases of this sort should be set aside." Lord Deas reserved his opinion on the question whether, if the heir in possession had sufficient capital to work out the whole minerals with extraordinary rapidity, he would be under any restrictions; and Lord Ivory, who dissented from the judgment, seemed to be of opinion that the powers of the heir must be limited by what is fair and ordinary administration, and that although no grassum may be received, and there may technically be no alienation, still there may be so gross a disregard of the rights of subsequent heirs as to render a lease or other act of administration illegal. He quotes with approval the note of Lord Cowan in the case: "Were an heir of entail to put down pits in every corner of the estate and exhaust a valuable coal-field within a short period of time which, wrought in a reasonable manner, might have endured for a long course of years, and beyond his own possession, there is no authority for saying that this might not be brought under challenge as in excess of his powers." It may be doubted whether the control by substitute heirs over the proprietary rights of the heir in possession has not been diminished by the recent judgment (dissented from by Lord Deas) in *Earl of Breadalbane* v. *Jamieson* (March 16, 1877, 4 Rettie, 667). If all the remedies of substitute heirs are to be found in the deed of entail, little room will be left for the class of cases of which the Bredisholme case is a leading example. In *Clerk* v. *Clerk* (March 20, 1872, 10 Macph. 647) the Court showed a disposition to assist the heir in possession, even when prohibited to communicate coal-levels; for in spite of such prohibition they authorized him to communicate the level, so far as necessary or beneficial to the working out the minerals on the estate, and not permanently detrimental to the mines, subject to an obligation to close the communication when its purpose was served. The Lord President there stated that if the effect of such a communication, though not prohibited by the deed of entail, would be manifestly detrimental to the estate, the heir in possession might be restrained by interdict; and Lord Deas stated that he "would not allow one heir of entail to incur the risk of flooding the mineral field, merely that he might be able to excavate more during his lifetime."

There seems to be some discrepancy between the decisions which define the manner in which mineral rent is to be taken into account as rent under the Entail Acts for the purpose of fixing the amount of entail provisions. We have already seen the rule of valuation and percentage adopted by the Court with reference to composition in the case of Allan's Trustees. In the case of Wellwood, to which we have already referred, it was, in the first place, decided as a general principle that in questions under the Aberdeen Act mineral rent in some form or other was to be treated as free yearly rent; the notion of such produce being *pars soli* was deliberately rejected by the Court as too metaphysical for the transactions of modern life. In the sequel of that case (11 D. 248) it was further held that where coals were let (rent being payable by a lordship or royalty), the whole royalty received in the year of the death of the granter of the provision was not to be taken as part of the free yearly rent, but an average of years prior to the death was to be taken, and in that particular case an average of seven years was taken. It had been previously held in the case of Campbell (9 Sh. 624) that fluctuations in grain rent could not be taken into account, but, as Lord Fullerton pointed out, the fluctuation here was beyond the control of all parties, "but the amount of a lordship depends on the will of the tenant when the mines are let, and of the proprietor when they are not let." And Lord Jeffrey added, "To admit the contrary doctrine would cut two ways. It might create either the hopeless impoverishment of the heir, or *per contra*, an utter defeasance of the provisions of the granter." This principle was followed in *Douglas* v. *Scott & Yorke* (December 17, 1869, 8 Macph. 360), where an average of three years only was taken, the lease having been renewed only three years before the death of the granter, at twice the original rent. There was in that case an optional lordship. It was intimated by Lord Justice-Clerk Moncreiff that the estimate of the rent might not in every case proceed on an average of years, but that in some a valuation on ordinary principles might be allowed. This was assented to by Lord Neaves, but dissented from by Lord Benholme on the ground that it introduced the speculative element of the prospective value of minerals. The recent case of Christie, on the other hand (December 10, 1878, 6 Rettie, 301), seems to establish the rule that where there is a rent payable under a mineral lease current at the date of the granter's death, that must be taken as conclusive, and no inquiry into the value of the minerals will be allowed. The hardship of such a rule to the heir in possession was in that case apparent, because not only did the lease in question confer on the tenant very large powers of breaking, but in point of fact, after an unsuccessful challenge on the ground of sterility, the tenant did exercise his power to break a very few years after the granter's death. This is surely "within the control" of the tenant, as Lord Fullerton said in Wellwood's case. The judgment of Lord Adam (Ordinary) in

Christie v. *Christie* is entitled to consideration. He allowed inquiry as to the value and extent of the minerals, there being in fact none. There seems to be nothing in the Entail Acts calling for the application of an inflexible rule. This, indeed, was admitted by Lord Deas, who said there "was a sufficient degree of permanency in the rent payable under the lease" to make it conclusive for the purpose in question.

(To be continued.)

NOTES IN THE INNER HOUSE.

The Lord Advocate v. *Lord Lovat* (March 7, 1879, Second Division) is one of those cases which delight the heart of the feudal lawyer and antiquary. They occur from time to time, unwelcomed by reporters, for printers are apt to make sad havoc of the Latin phrases and quaint spelling with which the reports of such cases necessarily abound. Sometimes the question raised is a right of succession turning upon the clause in some entail, instrument of resignation, or charter of novodamus. Again the bone of contention takes the form of teinds, and the valuations and sub-valuations of those commissioners who have done such mischief to the parsons and benefit to the lairds are the objects of scrutiny. But no legal right has led to a greater number of these pompous lordly cases than that of salmon-fishing. To this latter class belongs the present case. It may readily be inferred that it is an action at the instance of the Crown, brought to vindicate a right of fishing against a subject who conceives that this right has become his own. The defender had an undoubted right of salmon-fishing below a certain point on a river; above that point he possessed lands upon both sides, by virtue of a barony title, without any express grant of salmon-fishings. He had, however, asserted his rights in various ways, and the question came to be, Had his title and the possession following thereon given him what he claimed, viz. the exclusive possession of the salmon-fishings not only below the point we have mentioned, but also above it? From circumstances it happened that the possession had been necessarily restricted. The upper fishings had up to a recent date been almost worthless in consequence of the use of close cruives, but the defender had nevertheless protected the river, fished occasionally, and prevented others from doing so. Reversing the Lord Ordinary (Curriehill), the Second Division held that the possession was sufficient to maintain the defender's rights within the limits of the barony lands.

The case was characterized by Lord Gifford as one which in its historical details was exceedingly complicated and difficult. Some six or seven centuries represented the period over which the

titles produced extended. There was a charter by William the Lion and a Bull of Pope Gregory IX. of the thirteenth century. It was necessary to trace the fortunes of the Lovat family, to take into account the extent of their original possessions, the forfeitures which followed their rebellion, and the restoration, with the accompanying new barony title which marked their return to royal favour. In giving judgment their Lordships expressed valuable opinions upon certain points. Thus the Lord Justice-Clerk was inclined to doubt the legal principle that rod-fishing, where net and coble are practicable, will not by itself be sufficient possession to set up a right of salmon-fishing, suggesting that modern usages have modified it, and that that possession is the strongest which produces the greatest amount of profit. Lord Gifford was of opinion that where salmon-fishings were held on a barony title *cum piscationibus*, possession of any part of the river was possession of the whole.

The cases of *Landale* v. *Goodall* and of *Scott* v. *The Local Authority of Carluke* (First Division) are illustrations of the law of arbitration. In Landale's case a contract of copartnership provided for a reference in all matters relating to the copartnership, and also in all matters relating to the meaning of "these presents," where the question or dispute was not otherwise specially provided for. It was held that this provision just placed the arbiter in the position of a court of law, and that no question which would not have been within the jurisdiction of a court of law could be decided by him. The question raised related to the appointment of a new manager, which was an office provided for in the contract. In giving judgment the Lord President said, "It appears to me that the appointment of a manager is just an ordinary act of administration, and I put to myself the question, whether because partners differ as to who shall be appointed manager, the majority could bring the matter to this Court to determine who shall be manager, and thus, it may be, overrule the opinion of the minority? I suppose there cannot be a doubt that the answer would be that they could not; of course if the majority were abusing their power, the minority could then get the aid of this Court, but not except on very strong allegations of abusing power. But if the Court could not interfere, why should the arbiter be able to do so, unless the matter has been specially committed to him?" In Scott's case the question was, whether the engineer of certain waterworks, who was also arbiter, was disqualified from exercising the latter office because in the former capacity he had reported that the works were in a disgraceful state through the fault of the contractor. The defender, acting upon his report, refused payment to the contractor, who brought an action, and met the plea that the question fell under the arbitration by urging that the arbiter had by issuing such a report disqualified himself from acting. The Court however sustained that plea, and could not see why the faithful performance of one duty should interfere with the other.

The case of *Tennent* v. *Martin and Dunlop* (March 6, First Division) is important because of the remarks of the Lord President upon various other cases relating to the same subject. A Sheriff Court petition for sequestration had been presented at the instance of a creditor. Shortly afterwards the bankrupt, with the consent of a creditor, obtained sequestration in the Bill Chamber, and a trustee was appointed, and other steps in the sequestration took place, including the realization of part of the estate. Then followed, within the period allowed for such petitions by the Bankruptcy Statute, an application for recall of this sequestration at the instance of the original petitioner in the Sheriff Court. The Inner House, reversing the Lord Ordinary, refused this application, both on the ground of inexpediency, looking to what had already occurred under the sequestration, and also because they held the petitioner barred in respect of homologation. The Lord Ordinary, in recalling the sequestration, founded upon the cases of *Jarvie* v. *Robertson* (Nov. 25, 1865, 4 Macph. 79) and *Kellock* v. *Anderson* (Dec. 14, 1875, 3 R. 239). But the Lord President pointed out that in those cases "no proceedings had followed upon the sequestration which was sought to be recalled, and therefore a case was presented for the discretion of the Court, in which the circumstances enabled the Court to give effect to the first petition, and to allow the sequestration to proceed under it without inconvenience. As there had been no proceedings in those cases it was easy to recall the sequestration, and to amend it anew on the conjoined petitions." At the same time it was held that no creditor can waive his right to have an incompetent sequestration recalled, and in this lay, in the opinion of the Lord President, the distinction between the present case and that of *Ballantyne* v. *Barr* (29th January 1867, 5 Macph. 330), when the objection founded upon the alleged homologation was sufficiently "answered by showing that the sequestration had been incompetent from the beginning—a very different state of matters."

In *Smith* v. *Smith* (March 7, 1879, First Division) the circumstances were these. A. disponed to B., his brother, certain heritable subjects, being under an obligation to burden them in his favour. The title was *ex facie* absolute, but B. granted a back letter in which he acknowledged that the disposition was in security, and bound himself to reconvey upon the death of their mother, or at any time within the space of one year thereafter, "if required by you or your heirs." A number of years after the death of their mother, A. requested B. to reconvey the property, which he declined to do, upon the ground that as A. had failed to demand this and settle with him within the year fixed in the back letter, his, B.'s title, had become absolute. The Lord Ordinary (Young) sustained this defence, but the Inner House unanimously repelled it. Of course the question was whether this transaction was virtually a sale with a right of redemption, which if not exercised within a certain time was ineffectual, or a disposition in security requiring before it

could become anything more a declaration of expiration. In giving judgment the Lord President observed, "The defender refers to that clause with reference to the occurrence of the death of his mother, and says it is implied that if the pursuer did not redeem within a year after that event, then his right should come to an end, and his estate should become the property of the defender. That is not expressed. It may be implied. But assuming that it is clearly implied—assuming that it had been clearly expressed that the right if not exercised within that period should fall, I should still hold that until a declaration was raised against the pursuer to have it found that he had lost his right of reversion, this would not convert the transaction from a security to a sale, for the rule is quite fixed that if a transaction be originally a security, it cannot be converted into an absolute conveyance without a declaration of expiration."

The case of *Smith* v. *The Police Commissioners of Denny* (Second Division, March 19, 1879) illustrates the inexpediency of having under our Scottish system of Outer and Inner House, the latter, or Court of Appeal, composed of only three judges. The case was one raising a point of some difficulty as to which it is not surprising to find a difference of opinion. And we find the Lord Ordinary (Adam) and Lord Ormidale taking one view, and Lords Moncreiff and Gifford another. The action was one of interdict brought by a proprietor in the neighbourhood of Denny against the Police Commissioners of that town. The respondents, acting under the Public Health (Scotland) Act, were about to clean and enclose a well for the purpose of protecting it from pollution, which was situated upon the complainer's ground. It was quite clear that this well had been used for the prescriptive period by the inhabitants in its neighbourhood, and under the Act the respondents had power to look after all *public* wells. The question then came to be whether this well, in respect of its public use, had become public in the sense of the Act. The Lord Ordinary was of opinion that it had not, holding that as Denny was a mere village and not a burgh with burghal territory, there was no legal person in whom it could be held that the property of the well had vested for the benefit of the inhabitants. In his opinion, the right, if any, which the inhabitants of Denny had acquired was one of servitude, and such a right could not constitute the well public in the sense of the Public Health Act. The Lord Justice-Clerk, on the other hand, thought that as the question raised was one of possession and not of title, it was unnecessary to solve the difficulty arising out of the fact that Denny had no corporate existence. The respondents, as the Police Commissioners, had in his opinion an undoubted *locus standi* to vindicate any right possessed by the community which they represent; and if that community have enjoyed that right in perpetuity on any title, that is sufficient to regulate possession until the question of title is raised and decided in a declarator. "At the same time," he observed,

"I am not ready to concede, although I do not mean to do more than indicate doubts, that a well cannot become or be public unless there be either a corporation to receive it or trustees appointed to administer it, and that it may be reclaimed after centuries of public use by the proprietor of surrounding or adjoining land." His Lordship referred to the case of *Home* v. *Young* (Dec. 18, 1846, 9 D. 286), and the views thrown out from the Bench in that case upon the effect of mere inhabitancy in such questions. In that case the inhabitants represented a burgh of barony. While Lord Gifford concurred with the Lord Justice-Clerk, Lord Ormidale was of opinion that at the best the right of the respondents to this well could only form one of servitude, whereas it was necessary, before they could succeed, to establish that the well was public, and that the inhabitants of a defined district had a right gratuitously to use its water. "Merely to say that some of the inhabitants of Denny have been permitted to take water gratuitously from the well for making their tea or mixing their whisky, in return for which they contributed labour or money towards keeping it in repair, cannot make it a public well." It will be seen that this case is far from deciding the question of whether or not the mere inhabitants of a village can acquire rights of this sort by prescriptive use. All that the Court held was that they had a possessory right, which would compel the party calling it in question to take further steps before he could establish what he sought.

THE ENTAIL AMENDMENT (SCOTLAND) BILL, 1879.

A MEASURE which, although brief and apparently simple in character, may have very important results has been submitted to the House of Commons in the shape of a bill to amend the law of entail in Scotland. The bill is prepared and brought in by Mr. Barclay, the member for the county of Forfar, and by Mr. Fraser Mackintosh, who represents the Inverness district of burghs. As presented, the bill contains four clauses, two of these being purely formal, and the other two being in the following terms:—

"1. The date of presenting any application under the Acts of Parliament in force relating to entailed estates in Scotland shall be held to be the day on which the first interlocutor under such application has been or shall be pronounced, and no alteration of circumstances which has occurred or which shall occur subsequent to the date of presenting such application, whether by the birth of any intervening heir or by the death of any of the heirs of entail whose consents to the application must be obtained or dispensed with under the said Acts of Parliament, shall be deemed to have or shall have any effect upon the rights of the party who shall

present or who has presented such application, or shall affect the procedure taken therein.

"2. Whereas it is expedient that section twelve (sub-section three) of the Act of the thirty-eighth and thirty-ninth years of the reign of Her Majesty, chapter sixty-one, should be amended: Be it enacted, should the applicant in any application to the Court under the said Acts of Parliament, in which application it is necessary to obtain the consent or the dispensing with the consent of one or more heirs of entail, die during the course of the application, his disponee, legatee, or assignee, having such right specially conferred on him by the applicant, shall be entitled to be sisted in the process, at whatever stage the death may happen, and to prosecute the same."

The general nature of these provisions as stated in the rubric of each clause is (1) to prevent the right of any heir of entail presenting an application being affected by any alteration of circumstances occurring subsequently; (2) to provide that in any entail petition the death of the applicant should not invalidate the procedure.

It is of course obvious that in the existing position of matters where consents have to be obtained either hostility among the parties, or the knowledge of ill-health, or some such probable cause of increase of interest, may lead to attempts to prolong the period over which the litigation is extended; and, regardless of an expense ultimately at least thrown on the heir of entail in possession, to drag on the applicants by way of appeal from Court to Court in the hope that by some bye-chance a change of circumstances may arise. The applicant, the heir in possession, may die, there is one chance to go upon. The consenters, or one of them, may die; new heirs interpose by birth and so forth.

The whole tendency of our general legislation has been to avoid delays and expense, and to prevent its being in the power of one side unrighteously to prolong useless litigation. Now as matters stand it is, or at least it may be, obviously the interest of various persons to create delay, and consequent expense, even though the litigation should be useless and manifestly certain to fail. So in the one direction the spirit of our laws in general is opposed to what we find as the result of the entail statutes in this direction. Again, the tendency of the special entail legislation for Scotland is opposed to the interposition of new difficulties between an entailed proprietor and his acquisition of the estate in fee simple. All the leaning of our Entail Acts, since the first, is in the direction of loosening rather than tightening the fetters. Let us shortly glance back at the history of entail in this country and we shall see how true this is. The original Act of 1685 had existed but sixty-one years, when its bonds were in some respects found oppressive, and, as early as the Act 20 Geo. II. c. 50 and 51, the tinkering process was begun. By this statute powers are conferred upon heirs of entail to sell the superiorities of the tailzied lands

held by vassals or by the Crown to the holders, but always upon the condition that the price of the superiorities thus sold should be employed in purchase of other lands to be entailed upon the same series of heirs, and with the same prohibitive, irritant, and resolutive clauses as those sold. Then followed in 1762 the Montgomery Act (10 Geo. III. 51), which was really the first considerable amendment on the original enactment. Under the Entail Act of 1685 there were of course provisions made with the express object of securing the validity and indestructible character of the guarded succession; and no doubt it was hoped and believed that the effect of the Act would be beneficial to the proprietors of land, for whose interest almost exclusively the power of the Legislature was in those times exercised. That this is the case any one who turns to the last volume of the "Scots Acts" will see. Even in the first session of the first Parliament of James VII., all sorts of legislation may be found concerning, for example, Game, Commissioners of Supply, Justices of the Peace, "ordaining that Tenants be obliged by their tacks to live regularly," "Plantation of Kirks and Valuation of Teinds," but keeping ever in view the one class of favoured interests. Nor, indeed, can we much wonder at such a disposition on the part of a Scottish Parliament when we remember the extreme poverty of the country at the time, and the absence of manufactures and of trade, whereby land came in fact to be the only commodity dealt in, and consequently, according to the views of those times, the only fit subject for legislation of a non-penal character.

As however, we have already observed, the fair pleasant side of entails was seen to best advantage by those who were either original entailers, or by those who reaped the benefit thereby of a succession to which otherwise the *spes successionis* would have remained but a *spes* for ever. The natural heir, who would or might have succeeded to the estate, entail or no entail, found himself very soon in an awkward position. His father, for instance, might have been very short of funds; his creditors might have been pressing, and pressing hard, as they knew their chances of payment remained only so long as their debtor lived to draw and hand over the rents; and then the appeal would be made which few sons could resist, the appeal to ease the paternal difficulties by sharing the burdens, and so the son in his turn was plunged in debt and distress. Many such cases soon arose, no doubt; but quite apart from these there must have been other galling things even in those early days of entail to trouble the mind of the by-law-succeeding laird. His neighbour, free from entail, could improve as he chose, and put on a burden correspondingly, so that younger children might not lose the capital expended on their elder brother's succession. He could not. His neighbour's son gave him trouble, and he could carry out a threat of punishment for misbehaviour by altering his will. No will could affect the right of an heir of entail.

But it is useless to multiply examples of the trials and difficulties of an heir of entail, who at the very outset must have found himself little better, probably a good deal worse, than a liferenter. The thongs that bound the victims galled them, and they chafed under their burdens, till with an effort the first of the girths was broken, and the Montgomery Act was law. A few sentences will suffice to show in what direction this Act began to work. We may quote from several places in this, almost the earliest amending statute, to show how already in 1770 the Legislature had recognised the fact that the Act of 1685 was intended wholly for the benefit of the entailed proprietors, and without regarding the public interest; and how, further, not only the general public had suffered in consequence, but those very proprietors whose estates were entailed had begun to feel the inconvenience of their position. The preamble of the Act (10 Geo. III. c. 51) sets forth that "whereas many tailzies . . . . . do contain clauses . . . . . limiting the heirs of entail from granting tickets or leases . . . . whereby the cultivation of land is greatly obstructed, and much mischief arises to the public. . . . . Wherefore, to prevent a mischief so hurtful to the public," powers are given to the proprietors of entailed estates to grant leases for any number of years, not exceeding thirty-one, or for fourteen years and one existing life, or for two existing lives, under certain provisions as to enclosure. Then there is a provision to allow building leases upon the preamble that "the building of villages and houses upon entailed estates may in many cases be beneficial to the public" were heirs of entail permitted to encourage this. *On the public*, be it observed, the benefit is conferred. In both instances the Act seems to look to public weal, not to the interest of the proprietor; and very true it is that the public were largely concerned, but we cannot believe that the entailed proprietors were themselves dead to the beneficial effect of such legislation towards themselves. Their powerlessness to grant leases had led to a precarious tenure on the part of their tenantry, discouraging to every improvement, even to industry itself; while the inability to give a good title to those disposed to build probably had in many cases deprived them of the social influence and pecuniary advantages arising from villages, and even towns, springing up on their estates—still it was pleasing to the public to think that their interests were not being overlooked. So, again, we find the same tone adopted in section 5: "Whereas it may be highly beneficial to the public if entailed proprietors were empowered to lay out money in enclosing, planting, and draining," and then for the money expended on these and other specified improvements the proprietor is made a creditor of the succeeding heirs of entail to the extent of three-fourths. Finally, we may notice the terms of the 27th section: "And whereas it frequently happens that the enclosing of lands in Scotland may be retarded or prevented by heirs of entail not having it in their power" to make exchanges of land for the

convenience and advantage of their estates, and more conducive to "the improvement of the country in general;" therefore, under certain restrictions as to amount and so forth, the power to excamb was given, these restrictions, however, being altered by the subsequent Act 31 and 32 Vict. c. 84, of which more hereafter.

This permission to improve and charge the monies so expended, or at least the larger portion of them, as a burden on the entailed estate was very rigidly interpreted by the Court. Moir says of the results of the decisions that "these powers have been subjected to a very strict and somewhat capricious construction." For example, taking a few among the collection of decisions summarized by Menzies (Conveyancing, p. 749), we find that in *Baillie* (17th July 1850, 13 D. 42) it was held that an embankment to secure outfall for drainage was chargeable under the Montgomery Act; but an engine to work minerals (*Earl of Glasgow*, 27th Nov. 1850, 13 D. 187) was not, being a means for exhausting the estate. It has been also decided that furnishing a mill with millstones is not a permanent improvement, though bringing water into a mansion-house or filling up an old quarry is so (*Muirhead*, 10th March 1853, 15 D. 517.) You may drain and claim for improvement, but you cannot charge the expense of trenching previous to draining (*Ramsay*, 21st Nov. 1854, 17 D. 74). The expense of building a racket-court was disallowed (*Earl of Eglinton*, 31st Jan. 1857, 19 D. 346); so also was a shooting-lodge (*Duke of Athole*, 3rd July 1855, 17 D. 1015), and a shed for game, and a dog's couch (*Duke of Athole*, 4th March 1856, 18 D. 730). But in *Marquis of Huntly* (12th June 1857, 19 D. 818) the expense of building a dog-kennel was allowed. It would not be difficult to increase the list, but these cases sufficiently show the somewhat erratic course taken by the Court of Session in the matter, and the results have led to yet further legislation. Thus in the statute 59 Geo. III. c. 61, sections 15-17, there are also certain provisions in favour of the heir of entail in possession who may have paid assessments for building gaols, and who is made a creditor against the succeeding heirs for three-fourths of the amount, with interest from the date of the opening of the succession. And again, by 11 and 12 Vict. c. 36, sec. 20, private roads were expressly declared to be improvements falling under the Montgomery Act, and the Act 23 and 24 Vict. c. 95, included similarly labourers' cottages.

The Aberdeen Act in 1824 (5 Geo. IV. c. 87) was passed to meet cases where the entail either entirely excluded all provisions to a widow or children, or where the amount provided was too restricted in amount. It was, of course, also a step in the direction of conferring greater powers on the heir in possession. In an Act known as the Rosebery Act, and passed in 6 and 7 Will. IV. c. 41, powers of leasing lands and minerals were conferred, also powers to excamb and to sell for entailer's debts. The Rosebery Act was in its turn amended by the statute of 1841 (4 and 5 Vict. c. 24), and, generally

speaking, all the Acts of this period have been to a great degree amended, altered, and superseded. A passing reference may be made to the Act 3 and 4 Vict. c. 48, which confers powers of feuing, etc., under certain conditions, and to the Acts 42 Geo. III. c. 116, and 1 and 2 Will. IV. c. 43, secs. 68, 69, which gave to the heir in possession other powers.

Again, if we turn to the next of the amending statutes, the well-known Rutherfurd Act, passed in 1848 (11 and 12 Vict. c. 36), the same evidence is before us, the same desire is apparent. This famous enactment truly did not so much amend the old law of entail as create an entirely new branch of land legislation. The former and substantial idea of irrevocable entail, and of the perpetuation of the succession to an estate in the one family, at least so long as that family, or any of its substitutes in the original deed, should exist, now vanished, and we find a fresh order of things, contemplating disentail, estimating interests, providing for consents, and guarding against the possible introduction of the older evils by the aid of such technical devices, for example, as trusts, or liferents, or long leases. The Rutherfurd Act, however, to return more closely to the matter we are specially considering, begins in its very preamble by stating roundly that "the law of entail in Scotland has been found to be attended with serious evils both to heirs of entail and to the community at large, and it is expedient that the same be amended." The tone is very different indeed from that of the original statute, where occur the words which have led to so much of evil and so little, comparatively speaking, of good: "It shall be lawful to his Majestie's subjects to tailzie their lands and estates, and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annailzie, or dispone the said lands, or any part thereof, or contract debt, or do any other deed whereby the samen may be apprysed, adjudged, or evicted from the others substitute in the tailzie, or the succession frustrate or interrupted, declaring all such deeds to be in themselves null and void." The author of this great piece of legislation clearly recognised the disadvantages of the existing system to all concerned. He did not merely contemplate a benefit to the community, but also to the entailed proprietors themselves. We all know the entire revolution this Act inaugurated by conferring the power to disentail. No doubt that power was hedged in at first by many careful provisions, but already many entailed proprietors can if they wish disentail without consents, and ultimately, as the older generation dies out, all will be in that position. We purposely pass on, without attempting what would inevitably be at best in the circumstances an imperfect sketch of other provisions in this Act, and take up the next conspicuous amending statute, 16 and 17 Vict. c. 94. The preamble here sets forth that the provisions of the Rutherfurd Act

"have been found to be highly beneficial," and that "it is expedient to extend the benefits and to facilitate the operation of the said Act, and still further *to simplify the procedure* under the same." Now we have italicized these words in the preamble, because, as we hope to show, the provision of one or two clauses in this simplifying statute are very interesting in their effect. The 19th section of the Act is in these terms: "The date of presenting any application under the said recited Act (11 and 12 Vict. c. 36), or under this Act, shall be held to be the day on which the first interlocutor under such application has been or shall be pronounced, and no alteration of circumstances which has occurred or which shall occur subsequent both to the date of presenting such application and to the last date of the consents required to the same, whether by the birth of any intervening heir or by the death of any granter of such consent, or otherwise except as hereinbefore specially provided, shall be deemed to have or shall have any effect upon the rights of the party who shall present or who has presented such application, or shall affect the procedure taken therein." Again, we find in section 24 the following provision: "Every judgment and decree pronounced, and that shall be pronounced, upon any application under the said recited Act, or under this Act, where such judgment or decree has not been or shall not be brought under review of the House of Lords by appeal, or brought under reduction upon any relevant ground during the period within which such judgment or decree might have been appealed from, shall, as regards third parties acting *bona fide* on the faith thereof, be no longer reducible on any ground of irregularity or non-compliance with the provisions of the said recited Act or of this Act, but in respect of any such ground of challenge be final and conclusive," etc. Special favour is thus shown to decrees under the Entail Act, by rendering them so soon final, instead of exposing them to the risks of the long prescriptive period.

The Act next following on that of 1853 was passed in 1868 (31 and 32 Vict. c. 84). It confers powers to grant feus and building leases, laying down the procedure in so doing; powers as to provisions to the wife and children of an heir apparent are also conferred, and likewise to sell under authority of the Court certain portions of the estate by private bargain or public roup where there are or may be debts affecting the fee. There are also other clauses in the Act, but we have noticed those of most general interest.

Pass we, then, to the next instance in which the sanction of Parliament was obtained to the proposition advanced so often previously, that "it is expedient further to amend the law of entail in Scotland." This Act (38 and 39 Vict. c. 61) of 1875 we may briefly examine, and observe in its clauses how wide the relaxations in favour of entailed proprietors have become. For example, as to those "improvements" which form legal charges against the entailed estate by the proprietor through whom they have been

accomplished, the 1875 Act enumerates a long list, including even the making of tramways, railways, and canals, the building of engine-houses, and the erection of jetties and landing-places on the shores of lakes or of the sea. Then again (section 4), the age of a consenting nearest heir is reduced from Lord Rutherfurd's old requirement of twenty-five and is made twenty-one. The 5th section which follows is very important. In the first place it permits the consent to be given competently in any petition for disentail *after* the application has been made, and when it is before the Court. In the second place, it provides for the case of any of the heirs entitled to succeed (excepting the nearest heir) refusing to give consent to the disentail or being legally incapable of doing so. The Act provides that in such an event "(*a*) the Court shall, on a motion to that effect by the petitioner in the application, and on a statement by him of the declinature, or refusal, or incapacity of such heir or heirs aforesaid, and after intimation to the heir or heirs so declining or refusing, or to the guardians or other persons interested in the heir or heirs incapacitated as aforesaid, as the Court shall think necessary, ascertain the value in money of the expectancy or interest in the entailed estate with reference to such application of such heir or heirs declining, or refusing, or incapacitated to give consent as aforesaid. (*b*) Upon such value in money being ascertained to the satisfaction of the Court, the Court shall direct the sum so ascertained to be paid into bank in name of the heir or heirs the value of whose expectancy or interest has been ascertained as aforesaid, or that proper security shall be given over the estate which is the subject of application for the amount so ascertained in favour of the heir or heirs aforesaid. (*c*) Upon such value in money being so paid or secured to the satisfaction of the Court, the Court shall dispense with the consent or consents of the heir or heirs the value of whose expectancy or interest has been ascertained as aforesaid, and shall thereupon proceed as if such consent or consents had been obtained;" provided always that nothing herein contained shall render it competent to dispense "with the consent of the nearest heir for the time entitled to succeed to any estate sought to be disentailed." Here we have a very wide and sweeping enactment, enabling practically almost any entailed proprietor to get rid of his fetters and acquire his estate in fee simple. Thus, an old man with a son who is married, but has no male issue, may disentail with the consent of that son, and compel the consent, or, as the Act puts it, get the Court to "dispense" with the consent, of the more distant heirs on paying them the value of their expectancy, possibly a mere trifle in amount. Yet the entail remains so far good that the son's co-operation is essential, and the entail cannot be got rid of without consent.

Further on, in section 12, the procedure in applications to the Court is carefully prescribed in various sub-sections, of which (1) relates to the proper *forum*, (2) to the proper petitioners, (3) is thus:

Should the applicant die, his personal representative, "or his successor in the entailed estate, or his disponee, legatee, or assignee, or any of them, according to their respective rights and interests, shall, except in the case of applications in which it is necessary to obtain the consent, or the dispensing with the consent of one or more heirs of entail, be entitled to be sisted in the process, at whatever stage the death may happen, and to prosecute the same;" (4) relates to advertisement and intimation; (5) a schedule in place of an affidavit may be lodged in disentail petitions; (6) and (7) as to expenses and fees.

We may note, however, in passing, the expense all these enactments throw upon those who are so fortunate or unfortunate as to own estates where the fostering care of an ancestor has built up a fence of entail, with all its man-traps and spring-guns, its spiked railings and glass-topped walls, in the shape of prohibitive, irritant, and resolutive clauses, framed with the utmost ingenuity of professional handicraftsmen. The poor laird hesitates between leaving things as they are and striving to rid himself of the incubus. If he adopts the former course, justice perhaps to his younger children, necessity perhaps (if in the case of an entail confined to males) to secure what he can for his daughters, dislike perhaps of his heir, or all of these causes combined, lead him to charge his improvements on the estate, there at once is a heavy expense, perhaps a battle-royal is fought over the matter; or again, he may wish to secure by bond provisions to his children, there is another mode of getting rid of his already scanty cash. If, on the other hand, he resolves to adopt the second course and disentail, he is instantly face to face with certain expense and possible litigation. The actuaries who calculate the expectancy of heirs must be paid, his counsel who presents the petition must be instructed, his agent who gets up the facts and drafts the formal application will surely render his account, nor will a substantial fee be forgotten to that other "man of business" to whom the Court, to save itself trouble, remits the whole process with an order to report upon it.

Incidentally by the way, though it is somewhat of a digression, we may observe that of the many attacks made in many quarters upon the Court of Session, none, so far as we are aware, has touched this matter of "remits," and yet it is one of the most serious abuses of our legal system in Scotland. Almost every wretched little petition (except certain well-known and formal ones) is remitted to somebody, either to the accountant or to some man of business in whom the Judge, for reasons best known to himself, has confidence. Now, to the remit to the accountant we cannot seriously object, he is an officer of Court, and perhaps it may be necessary. We must, however, suggest that it would be proper to make it compulsory on the representatives of a judicial factor, for example, who may have died to accept the discharge of all the beneficiaries in the estate he administered if tendered, and thus enable beneficiaries to avoid the

expense of a petition for exoneration, with a remit to the accountant of Court for a report on the management during a period which cannot fail to be less than six months. But it is in these remits to men of business that we find the abuse. Many cases are remitted in this way by a judge which there is no earthly reason why he should not himself look into and dispose of, but where some complications exist as to titles and so forth; judicial time, perhaps, is too valuable to be thus occupied; nor were blank days, conventional or otherwise, intended to be spent in a business-room poring over musty tomes and the confused hieroglyphics of a charter-chest. Well, be it so! Let an "Examiner of Petitions," or an officer called by any name that pleaseth the eye and the ear, be appointed. Let him be paid a fixed salary, with "nary" an extra fee, and let all remits as a matter of course be sent to him, the fee fund receiving a small percentage from the petitioner. Thus we should keep down an almost absurd item of expense which, especially in entail petitions, causes more heartburning than would generally be credited. Besides it is human nature, and accordingly probable, that those who are dealing with that which is not their own should act "handsomely;" so the fees sent to the agents, who in these little affairs are the "men of skill," are frequently calculated upon a not illiberal scale, and have the further advantage of not being liable to taxation upon the same system and scale as ordinary business accounts. (See also as to this 38 and 39 Vict. c. 61, section 12, sub-section 7.)

But we have yet a few words to say about the last Entail Amendment Act, passed in 1878, which is directed to be "read and construed as one with the "Entail Amendment (Scotland) Act, 1875." It contains enactments rendering obligations undertaken by an heir of entail in possession to tenants for improvements, such as those included in the 1875 Act (section 3), enforceable against the succeeding heir, and not against the executor, and a similar provision is made regarding contracts entered into for such improvements. The 7th, 8th, 9th, 10th, and 11th clauses of the 1875 Act are also made applicable to entails dated subsequent to August 1, 1848.

So far, then, for the Acts as they have gradually been piled one upon another. The bill, however, to which we are specially directing attention is intended to remedy what has been decided to be the legal effect of the provisions of these statutes of 1853 and 1875. In the case of *Robertson* (June 10, 1864, 2 Macph. 1178) it was decided that the right to carry on the proceedings in a petition for disentail was personal to Mr. Duncan Robertson, the heir in possession, and as he died before the entail had been recorded (although all the consents had been obtained, and deeds of consent executed by the three next heirs), there could be no right transmitted by him to his representatives. We may also refer to the case of *Maxwell* (July 17, 1877), where the heir in possession died pending some proceedings for authority to borrow and charge im-

provement expenditure. His son, who succeeded him, applied to be sisted in his place in the proceedings, but the Court refused to sist him. What, in short, the authorities come to is, that until the interlocutor dispensing with the consents of second and third heirs has become final, the consents, to the requisite statutory extent at least, have not been given. Thus, if the applicant himself should die before this critical moment, his executor cannot carry on the proceedings, all falls to the ground; again, if one of the three next heirs dies, of course some new heir comes in the sense of becoming one of the three next entitled, and that also terminates the whole proceedings. Lastly, an heir may be born, who by being nearer than one of the next three heirs alters matters, and similarly terminates the application.

It will be remembered that the Rutherfurd Act, by section 33, directs all applications to be made by way of "summary petition," and this is presumably the case in the various other Acts relating to entails. Prior to 1875 no complication could affect the prosecution of the application; but the Act of 1875 has omitted on this subject to provide for such an eventuality, and just as the 1853 Act was passed to obviate an omission in the Rutherfurd Act, so this bill has, it is said, been brought in to remedy the grievance which permits second and third heirs (whose interests by the 1875 Act are reduced to a purely pecuniary question) to indulge in protracted litigation, stimulated by the hope that something may occur to quash the proceedings. Excepting where consents are required the death of the petitioner does not affect the proceedings in an entail petition. That is the position as regards improvements, and there certainly seems much force in the suggestion that it should be made to extend to these cases where consents, though required, can be on certain terms dispensed with.

In conclusion, we are indebted to a friend for the following statistics as to entail petitions and actions which have occupied the Court of Session alone during the years 1876, 1877, and 1878. There were in 1876 presented 105 petitions, in 1877, 91, and in 1878, 85, or an average of 93 *per annum*. There are also usually from 20 to 30 actions connected with entails annually depending in the Court. Looking at all this from the economist point of view, each petition costs on the average at least £100, and the actions not less than £300. This, with 93 petitions (£9300) and 25 actions (£7500), would give £16,800 as the expense of entails to the litigants, and it is not an unreasonable thing, we think, to estimate the expense of judicial staff—clerks of Court, etc.—as bringing up the total cost of entails to something like £20,000 per annum.

With the knowledge of such facts as these, and of the extraordinary and anomalous position in which heirs of entail now stand, it cannot be wondered that efforts should be constantly made to further ease the difficulties that exist. The present bill is one of these efforts, and we sincerely hope it may meet with success, for

though continual tinkering at Acts of Parliament is much to be deprecated, yet this bill appears to be intended to obviate an omission in what was itself but a tinkering statute, and also to remedy a grave injustice.

PETTY CUSTOMS.

In the index to our reports there are numerous cases in which the magistrates of Scottish royal burghs appear either as pursuers or defenders. They are to be found alike in Morison and the Faculty Collection, and in the more recent volumes of Shaw and Macpherson. Upon examination it will be observed that they relate chiefly to questions concerning the petty customs of such burghs. As some have occurred quite lately, these questions have not merely an antiquarian interest, and we propose in the following article to digest the leading cases in which they have been raised.

Erskine (i. 4, 22) says that the magistrates, in the capacity of representing the community which they govern, "can not only proportion among the inhabitants the burden of taxations imposed by Parliament, but they may impose taxations for the utility of the burgh by their own authority." But, he adds, that in order to do this they require the consent of the special corporations burdened. He refers to the case of the *Town of Aberdeen* (January 11, 1678), in which the Lords found "that the magistrates might stent for the utility of the burgh, but then only upon calling the whole incorporation, and proceeding with the consent of the major part of those who should happen to convene." It would rather appear that individual burghers might have opposed such an imposition, which, it is almost unnecessary to say, is unknown in modern times.

Petty customs differ in different burghs both as regards their origin and their nature. They may have originated in Acts of Parliament or charters, or in the mere acquiescence of the inhabitants. They are so affected by usage, however, that the question of their origin in any particular place may be of little moment. The question is, what has been the practice? for usage may, it seems, both create and extend them.

Sometimes an attempt has been made by the creditors of insolvent burghs to attach the right of exacting petty customs. Thus in the case of the magistrates of Auchtermuchty a creditor raised an action of adjudication of the whole property of the burgh, including jail and town-house with bell, and the petty customs of the burgh leviable by the magistrates under a charter which gave them power to regulate the amount of the dues. But the Court held the sale of such customs to be incompetent, the

Lord Justice-Clerk remarking, "that if the customs are not to be levied by the burgh the lieges must be freed from them entirely; and if they are to remain exigible, the burgh alone can exact them" (5 Shaw, 693). In the case of the *Magistrates of Lochmaben* (November 16, 1841, 4 D. 16) a judicial factor had been appointed to look after the interests of the insolvent burgh, who had collected the customs. The magistrates came into Court for the purpose of having the factor compelled to account to them for such customs as he had received, and to have it found that they without his interference were still entitled to levy and expend these customs in future. The Court held that it was impossible to distinguish between the produce and the right to levy, and sustained the right of the magistrates, although they refused to allow them repetition of bygones already received and applied by the creditors. Lord Justice-Clerk (Hope), who gave an opinión as Lord Probationer in this case, held "that all burghal property contained in the charter of erection, especially such property as the produce of a right to levy petty customs, is in the first instance necessarily and inalienably appropriated and devoted to the expense of the burdens, presentations, and duties incumbent on the burgh by reason of its creation as a royal burgh." The question whether creditors might avail themselves of any surplus was not then decided. The question raised by the above cases came up again under somewhat different circumstances in *Kerr* v. *The Magistrates of Linlithgow* (January 14, 1865, 3 Macph. 370). A creditor of this ancient burgh arrested in the hands of a person named Kerr who farmed the customs. Kerr raised an action of multiplepoinding in which the fund *in medio* was the rent due by him to the magistrates. This action brought into the field the magistrates claiming the whole fund; the arrester, who, as a rider upon the magistrates' claim, sought the fund in so far as not absolutely necessary for the public purposes of the burgh; and lastly, a heritable creditor to whom the magistrates had disponed their customs in security. The Lord Ordinary (Barcaple) sustained the arrester's claim in so far as there might be a surplus after supplying the public purposes, and appointed the magistrates to give in a statement showing the public purposes of the burgh and disbursements. But the Inner House reversed, holding that petty customs could not be alienated to any extent by the burgh. Lord Ardmillan made the following remarks, which seem to embody what may now be practically considered the law on this subject: "To no extent are creditors of a royal burgh entitled to attach the right to levy customs. That is quite settled, and well settled. Next, I think there is no difference in principle that the fund attached is not the customs but the rent paid for the customs. Farming is a reasonable and legitimate mode of dealing with the customs, and does not put the fund which is paid in the form of rent on a different legal footing or under different principles from what it would be if paid as customs. Third, I

think that these taxes or customs cannot, as a whole, be attached or arrested any more than the right to levy them can be adjudged, and indeed the claim here has been put on the lower ground that the surplus can be attached. Both on principle and in respect of the absolute inextricability of any other view of the matter, I think this claim cannot be maintained. The public service is the object and basis of these petty customs. It is for this purpose the right to levy customs is granted, and for this purpose they are levied, and the magistrates really hold them in trust for the public service of the burgh. If there should be a permanent surplus, I am strongly disposed to think that a lowering of the customs exacted, not a diversion of the fund, would be the legitimate result. I see no ground for presuming that there can be a surplus, and no means of ascertaining that there is a surplus, when the customs are thus given for public purposes to be administered at the discretion of the magistrates, and having no other criterion, we must just take the fund given as the measure of the service required."

But the most numerous class of cases relating to this subject have arisen out of disputes between the magistrates and the parties from whom such customs are levied. The practices of trade have altered, markets have been abandoned, private shops substituted, and new articles of commerce unknown when the grant of customs was given have been introduced. Hence material for many disputes.

It is somewhat doubtful whether there is any authority to support the contention that the magistrates of a royal burgh are entitled to impose *new* duties or customs. It is true that the rubric of the case of *Fergusson* v. *Magistrates of Glasgow*, 1786, as reported in Morison, 1999, bears, "Magistrates in royal burghs have power to impose new duties or customs on articles brought to market or sold in shops or elsewhere." But the report hardly warrants such a rubric. It was an action which arose out of the popularity of a new vegetable, the potato. There had been an impost or custom "immemorially levied on fish, oatmeal, and many sorts of vegetables." In 1781 the magistrates imposed a duty of 2s. on each cartload of potatoes, and this new regulation was challenged by some of the citizens. No doubt the magistrates maintained in their argument a right to impose *new* duties, which they averred had been given to the council and community of the burgh, "an expression not denoting the inhabitants at large." But they took up other grounds. They urged that the duty was to be viewed as "*a commutation* for those formerly established." "Potatoes, from being an article of luxury rather than of ordinary consumption, have now become in a great measure a substitute for oatmeal." Further, they separately contended that they had acquired by possession a right to exact the duty in question as their tacksman had ever claimed a custom on this article. The case was argued in the days when the Court were allowed, perhaps

expected, to change their minds after the first deliverance, and accordingly they first found that the magistrates had no right to impose any such duty, and then on advising a reclaiming petition with answers they discovered that such a right did exist. But as the grounds of judgment are not given it is impossible to say whether they recognised any general right apart from special circumstances to impose new duties. In the case of *Martin and others* v. *Magistrates of Aberdeen* (Feb. 25, 1801, F. C.) we find that of Fergusson quoted as an authority, not for the right to impose an additional exaction, but of making a regulation necessary for the preservation of an existing one. That decision was very favourable to magisterial authority. There was here no new commodity, but a new mode of trading in an old one. According to a table published by the magistrates of Aberdeen in 1777, tallow brought to the market was liable to a tax at the weigh-house. But the butchers began to sell by annual contract their tallow in a rough state, with this result that the weigh-house duty became almost wholly unproductive. Accordingly in 1798 the tacksman brought an action before the magistrates, in which the (it is to be hoped impartial) judges found that their impost could not be evaded by any alteration in the mode of selling, and although they assoilzied the defenders from past dues in respect that these had not been levied for several years, they indicated their intention to levy them in the future. The butchers then brought an action of declarator, "concluding to have it found that the magistrates had no right to levy any duty upon rough tallow, and that refined tallow was subject to it only when sold in the public market and weighed in the public weigh-house." The Lord Ordinary (Meadowbank) favoured the contention of the pursuers, being of opinion "that where, in consequence of an alteration of circumstances, an accustomed duty can no longer be exacted *in terminis* the Legislature only can give a substitute." But the Court assoilzied the defenders, and it was observed that "the right to exact petty customs is part of the original constitution of all the royal burghs in Scotland. It cannot signify whether the commodity be sold in the public market or in shops, nor in what shape it is exposed." In virtue of an Act of Parliament the magistrates of Dumfries had the right to impose a duty upon all meal sold in the meal-market. Their tacksman was successful in an action against parties who sold meal in private warehouses. It was, however, in this case averred that the immemorial practice had been to exact such duties from sellers in warehouses. Whether this influenced the decision or not does not appear, all that we are told is that it was observed from the Bench that as the town was at the expense of rearing and maintaining a market-place it would be circumventing the law to allow selling elsewhere (*Lawson, Jardine, & Co.* v. *Thomson*, Aug. 5, 1768, M. 1965).

The instructive case of *Wauchope* v. *Magistrates of Canongate* Jan. 28, 1800, F.C.) affords an amusing instance of the want of deci-

sion which at that period seems to have characterized the Scottish Bench. By Act of Parliament 1593 the Town Council of Edinburgh acquired the right to levy certain tolls at fixed rates at the Water-Gate of Edinburgh. In the course of time they raised the rates and imposed them upon new articles, and in 1795 a new table of rates, still further raising the scale of duties, led to judicial proceedings. The Court, we are informed, were much divided in opinion, some holding that no usage could justify a deviation from the Parliamentary grant of 1593, others that it could. At last they decided that the customs levied prior to 1795 might continue to be exacted. This was on 6th December 1798. The magistrates acquiesced, but the pursuers (road trustees) reclaimed, whereupon, on 15th June 1799, the Lords altered, and found that no duties other than those contained in the Act of Parliament could be exacted. And now the magistrates reclaimed, when, behold, the Court returned to their first interlocutor!

Subsequent decisions seem to have made it quite clear, 1st, that magistrates are not entitled to impose any new duty; and 2nd, apart from usage they cannot establish a different mode of collecting an old one. In *Raitt* v. *The Magistrates of Aberdeen* (Nov. 21, 1804, F. C.) it was found "that the magistrates have no authority to introduce new petty customs, or extend the old ones, whether in amount or as to the persons subject to them, beyond the amount and liability established by use and wont." In this case, under the table of duties issued by the magistrates, power was given to exact the duty on all cloth brought to market for sale, but in practice it was not levied upon any cloth save what was home-made and sold in booths erected upon the streets, and the Court restricted the right accordingly. A number of other cases might be quoted to the same effect. The latest is that of *Maxwell* v. *Magistrates of Dumfries* (17th December 1868, 6 S. L. R. 199, and 18th June 1869, 6 S. L. R. 575). Here the magistrates had the right to levy customs in virtue of charters and an Act of the Scottish Parliament which did not fix any rates. It was held that in passing a new table of customs no charge which was not sanctioned by immemorial usage could be made, and an accountant was appointed to frame a table with reference to usage.

Usage must also be taken into account in clearing up any ambiguity in the title under which such customs are levied. The rubric of the case of *Aboyne* v. *Magistrates of Edinburgh* (March 10, 1775, M. 1972) is as follows: "Immemorial possession and practice, where there is any dubiety upon the words of a grant as not being sufficiently comprehensive, become the rule for exacting as well as for the mode of levying particular duties." In the case of the *Magistrates of Dunbar* v. *Kelly* (Nov. 26, 1829, 8 Sh. 128) the magistrates were found liable in repetition of payments made in respect of an impost which they had levied as being in conformity

with an Act of Parliament, whereas in point of fact it was warranted neither by the statute nor by usage.

Magistrates have sometimes attempted in an indirect way to raise the customs. In the case of the *Fleshers of Kirkcaldy* v. *The Magistrates* (Dec. 17, 1822, 2 Sh. 96) the defenders were interdicted from levying a rent for a market-place in which butchers for over a century had sold their meat, paying only the dues which had been exacted previous to its erection. To demand a rent for the stalls would, it was held, be equivalent to raising the customs.

The Court of Session appear in one case to have favoured the magistrates in an attempt to substitute a new duty in place of one which a change in the practice of trade had rendered useless. "The magistrates of Edinburgh had a right of exacting dues on all cattle brought into the market of the House of Muir." The fleshers of Edinburgh were in use to resort to that market, and bought the cattle, which they brought into Edinburgh for the purpose of slaughter and consumption. As buyers at the House of Muir market, they stated that they enjoyed an exemption from the duty leviable on cattle brought into Edinburgh. But when the House of Muir market ceased to be resorted to, and the graziers and owners of cattle sold to the fleshers directly without resorting to any market, the magistrates then changed their mode of levying their dues (without consent of the Legislature) by levying the custom upon all bestial brought into Edinburgh, whether for the purpose of being there bought or sold, or for the purpose of being killed and consumed. The butchers brought a suspension, but the Court of Session decided in favour of the magistrates. This case, however, went to the House of Lords, where the judgment of the inferior Court was recalled. The only grounds upon which the magistrates could have prevailed are thus clearly stated by Lord Chancellor Eldon: "The question is, if the Court is right in saying that the appellants are liable to pay the duties because the sellers in the deserted markets were obliged to pay them. This was not the toll which was formerly demandable. It must have been on one of the grounds that the Court found this: 1st, That by reason of evasion, in the nature of a fraud on the appellants' part, the respondents were entitled to demand from them the duties that would otherwise have been paid at the markets; or, 2nd, That the respondents had by virtue of some ancient custom a right thus to tax his Majesty's subjects." Lord Thurloe pointed out that while the magistrates had established their right to the tolls of certain fixed markets, to insist upon a duty payable upon all cattle brought into the city would have the effect of giving to them a perpetual market. The House of Lords could find no proof in support of the right claimed and accordingly reversed (*Fleshers* v. *Magistrates of Edinburgh*, House of Lords, 22nd June 1802, 4 Patton Appeals, 375).

It thus appears that as regards these petty customs in royal burghs the question of most importance always must be, what

has been the usage? By not exacting what they are entitled to demand the magistrates may lose the right to tax which they once possessed. On the other hand, by acquiescing in increased, and what was at the first unlawful taxation, the inhabitants of the burgh may in course of time be deprived of any right to object. It is also clear that a custom may cease in consequence of altered circumstances, and that the magistrates are not then entitled at their own hand to substitute for it what they may consider an equivalent. They must in such a case seek their remedy in Parliament.

REMARKABLE CASE OF CONVICTION ON CIRCUMSTANTIAL EVIDENCE IN 1826.

The recent case of Habron, condemned for the Whalley Grange murder, has brought to remembrance a case in Glasgow upwards of fifty years ago, where a young man was convicted and narrowly escaped the gallows, though afterwards proved to have been perfectly innocent.

It was late in a night in April 1826, during the Spring Circuit or Assizes in Glasgow, that a memorable scene was enacted in the Court-room there. The interior of the building was then in a very different position than that in which it is now. The Judges sat on an elevated bench or apartment between colossal pillars, with the jury-seats on their right. The prisoners' bar was on the front of a large table, beneath and around which sat young counsel, few of whom are now in life. The public sat in an amphitheatre of raised benches. The hall even in mid-day was ill lighted, and at night, with the aid of a few candles placed on the bench and table, it was truly dismal. A lengthy trial had just terminated of a man and a boy for assault and robbery perpetrated on the Old Bridge of Glasgow. The name of the man was James Dollan, an Irishman, that of the boy Robert Syme, a weaver, and a native of Glasgow. The robbery had occurred on Saturday the 12th February previous. The man robbed was one Andrew Jack, a carpenter. The facts appearing in evidence were that Jack had that night been treating his fellow-workmen in a house in the High Street on the occasion of leaving the workshop, and was somewhat under the influence of strong drink. He resided in Tradeston, and was crossing the Old Bridge to the Gorbals on his way home, about twelve o'clock at night. There were few persons then on the bridge, and when he came to the south end he was all at once set on by two or three men, who knocked him down and rifled his pocket of about 10s. or 11s. Jack instantly seized one of the men, and firmly held him until, by his loud cries, several of the night police came from the

Gorbals side of the river, and found a man in his grip, who was the man Dollan. Jack had also seized another of the assailing party by a worsted comforter, which he had around his neck, but this man, to relieve himself, slipped it over his head, and on doing so Jack saw that his hat fell over the bridge into the river. So soon as Dollan was placed into the hands of the police Jack discovered another person standing looking on, and without a hat, and on this fact alone he charged him to the police as being another of the guilty party. The police accordingly took him into custody, and this was the young man Syme. No evidence was offered in defence. So conscious was Syme and his friends of his innocence, and the certainty of acquittal, that, being all very poor, they had employed neither agent nor counsel, and made no effort to adduce evidence in exculpation. A young barrister, Mr. Arthur Connel, volunteered the defence at the moment. This gentleman was grandson of Sir Islay Campbell, President of the Court of Session, and son of Mr. John Connel, Judge Admiral, and nephew of Lord Succoth. He afterwards retired from the Bar and became Professor of Chemistry in the University of St. Andrews. The jury, after retiring for a few minutes, brought in a unanimous verdict of guilty against Dollan, and by a plurality of voices the same against Syme, but with a recommendation to mercy because of his youth. In those days every Circuit in Glasgow left a sad legacy to the gibbet, and the Depute-Advocate, in moving for sentence, stated that considering the prevalence of street robberies during the previous winter, and the daring nature of the offence in this instance, he had some hesitation in restricting the libel to an arbitrary sentence in the case of Syme, but which he was only induced to do from the fact that up to the night in question the lad was wholly unknown to the police, whilst his companion in the bar was an old offender. The presiding Judge then assumed the black hat, and in solemn tones, during which the crowded hall was in breathless silence, he addressed the older prisoner on the duty of improving his numbered hours, and appointed the fatal day for his execution. He pointed out to the younger prisoner—who, forming a contrast to the cool demeanour of the older prisoner, seemed to stand in a state of entire stupefaction—the narrow escape he had made from a death punishment, and announced to him the next severest penal award in the Criminal Code—namely, banishment for life. So soon as the dread sentence was ended with the ominous words, "And may the Lord have mercy on your soul," the death-condemned criminal, in a clear and dauntless voice, and with a strong Hibernian accent, addressed the Judges in somewhat these words: "My Lords, I acknowledge my guilt, and resign myself to my sentence, but, as a dying man, I now declare that this lad who now stands beside me is wholly innocent of any blame in the crime for which I am to suffer, and I never saw him until that night when we first met together in the police office." This appeal startled all

who heard it, but the criminals were speedily removed, and the Court adjourned for the night.

The remarkable appeal, however, was not lost on the hearers. In particular, one young procurator, now the senior member of the faculty, felt deeply interested in the case, and resolved to investigate the matter. Several gentlemen also interested themselves, and especially a respected magistrate of the Gorbals, now deceased, Mr. Archibald Edmistone, a wood merchant in Hutchesontown. An array of affidavits, both as to the excellence of the young man's character and his entire innocence of the crime, was got up, from which the following facts were clearly made evident:—

The lad Syme, the son of a respectable mason in Glasgow, but who was then dead, was aged eighteen years. He resided with his widowed mother and two sisters in Main Street, Gorbals, above the shop of Dr. Strang, and within a hundred yards of the south end of the bridge. He had served four years' apprenticeship as a weaver to one Robert Whitehill, with whom he resided during that time, and who, with his wife, attested to his good character, and that he had never been absent one day from their house. He subsequently, and at the time in question, was working to one Joseph Hogarth, a weaver, in Centre Street, Tradeston. On the night in question he had been attending a meeting of a friendly society in Glasgow, of which he was a member and treasurer, and had been thus detained later than was his usual time of being home. Before going to bed for the night he sat in conversation at the fireside with his mother and sisters. A cry got up of a scuffle on the street, and cries for the police. With the thoughtlessness and curiosity incident to youth, Syme ran out to the mouth of the close, without thinking it necessary to put on his hat. The affray in the street, which was a drunken squabble between a man and his wife, was speedily allayed, when loud cries of murder and police were heard from the bridge, to which Syme instantly ran, and was first on the spot. The police followed, less swift in foot, and Jack having given up to the police a man he firmly held in grips, he pointed out Syme as another of the gang, and straightway he found himself in the custody of the police, charged with robbery, solely on the fact of his being in the place at that time without a hat. It was established that Jack was very much under the influence of liquor, and after the trial he gave an affidavit to the effect, that he "could not identify Syme as one of the men who robbed him, further than he was the man who was afterwards apprehended on the spot without his hat." Syme's aged mother and two sisters swore to the fact of his leaving the house at the very instant without his hat, and that he neither had on a worsted comforter nor a neckcloth at the time. The two policemen corroborated the facts as to the previous squabble near the place; and, strange to say, one of them, who was not examined in the trial, had seen Syme standing on the street without his hat, and

followed him to the bridge; and, more than that, he mentioned at the time to the other officer his conviction that he was innocent of the crime charged. With these, and numerous other affidavits and certificates, there was sent a solemn declaration, emitted before witnesses, by Dollan, a few days before he suffered death upon the gibbet, declaring, "As a dying man, and as I have to appear before the judgment-seat of Christ, I never saw Robert Syme until after the police had him in custody, and never spoke to him until I was in the police office in Glasgow, and in the most solemn manner I declare that he was not directly nor indirectly concerned in the robbery of Jack, and is entirely innocent of that crime."

The keeper of the prison (James Watson), the chaplain (James Morison), and a respected elder (Peter Ewing) who was in use to visit the prisoners, all bore the strongest testimony to Syme's good conduct whilst in confinement. The chaplain testified "that he has behaved himself truly well—he is penitent, not on account of the crime for which he is sentenced to transportation, for of that he feels innocent, but humble on account of his very humiliating situation. It is truly a pity," adds the chaplain, "that a young man such as he is should be doomed to suffer such a hard fate for a crime of which there is every reason to think he is not guilty."

The petition to his Majesty was accompanied with a strong recommendation from the jury, of which the late Charles Stirling of Cadder was foreman.

Copies of the petition and accompanying documents were sent to the then Justice-Clerk (Boyle), who, moved with the truthfulness of them, at once, most humanely, went himself to the Calton Hill Prison, to which Syme had been removed, and having seen and examined him, he ordered his detention there, whilst the other criminals were removed to the hulks. The case was then thoroughly investigated by the authorities, and the innocence of the man was fully made manifest. He shortly afterwards returned to Glasgow with a free pardon, to thank the friends who had so successfully interested themselves on his behalf. The whole evidence of guilt was his presence at the scene without his hat. This affords another instance of the danger of convicting on any single fact of circumstantial evidence without others strongly corroborative of guilt and exclusive of innocence. The man Dollan was executed in front of the prison on 7th June 1826.

DAMAGES CAUSED BY RABBITS.

"Is there any authority for saying that, if a man chose to put rabbits into a field, and if they came out and ate up the crops of another man, he would have no remedy except to keep an army of ferrets or a regiment of soldiers?" The question was put by

Dowse, B., in the case of *Patterson* v. *The Duke of Leinster*, in which the plaintiff had a verdict the other day. In charging the jury, his Lordship is reported to have said, as regards the cause of action for causing the plaintiff's crops to be injured by rabbits: "If a man kept wild rabbits in a preserve no action could be brought against him for any damage they might do once they got out of it, and the only remedy a man had was to kill them when they got out. He was, therefore, against the plaintiff as regards the rabbits, but would take the opinion of the jury upon the question of facts and afterwards frame the verdict according to his view of the law. The plaintiff's case was that the Duke encouraged the growth of wild rabbits and prevented them from being interfered with, that he allowed them to burrow on his preserves, and that these were the rabbits that came out foraging for food upon the plaintiff's lands. Mr. Hamilton (the defendant's agent) admitted that the rabbits were the Duke's, and that he would allow nobody to shoot them. He (Baron Dowse) wanted to ask a question, and he hoped it might receive some sort of attention, not by way of answer, but that it might sink into the minds of people listening to him—in the name of common sense, if the Duke did not own the rabbits, if they were wild beasts that he had no thought or regard for, what business was it of his whether any man shot them or not? If the Duke had no interest in these rabbits, why did he object to have them shot? What was the use of his restriction on the right of the tenants whose crops were to be eaten away in this fashion? You may ferret them; you may keep an expensive animal like a ferret—difficult to rear, expensive to purchase, and that must be looked after by a man connected with the art, and paid at the rate of 2s. a day and all the rabbits he kills—you are at liberty to keep dogs which cannot be kept without a tax of 2s. 6d. apiece, or, if the fatherly legislation at present promised ripens into fruition, a tax of 7s. 6d.; yet the man whose crop is to be eaten by rabbits, though he may keep expensive dogs and ferrets, is not at liberty to trap them or to shoot them. His Lordship could only say, on the case made for the Duke by counsel, that he thought these unwarrantable, illegal, and unjust restrictions on his tenants. All he could say was that if this part of the action had no foundation in point of law, as he thought it hardly had, there were facts and circumstances in it that went a long way to show that Mr. Patterson ought to be compensated for the damage done by the animals. The strange part of the case was that, though according to the contention for the defendant the rabbits were in the plaintiff's own ditch, and belonged to nobody, and were eating his crops, yet he was not at liberty to shoot them. That was an exercise of power on the part of the Duke of Leinster that appeared to him to be totally illegal, and totally unwarrantable. The case for the defendant was that the rabbits were on the plaintiff's own land, belonging to nobody, and eating up his crops, and that he

was at liberty to buy a ferret or keep dogs, but not to shoot or trap them. What was to prevent him? If the Duke got him to execute a lease in which it was forbidden, well and good; but as long as he was under the ægis of the common law of England he was entitled to exercise his rights as a freeman just as well as if he was the richest duke in the land."

The particular question involved appears to be one of some novelty in this country, and whatever English cases have any bearing on it will be found collected and discussed in *Fetherstone-Haugh* v. *Hagarty*, 12 Ir. L. T. Rep. 141, and see Oke's Game Laws, 3rd ed., 143. We have endeavoured to ascertain whether the Scottish law would throw any further light on the subject, but have not succeeded in finding much to the point; yet, as the Scottish adjudications are less generally known, it may be useful to state the result of our researches, even though all that we shall put together may not be directly pertinent to Patterson's case. In the first place, we find it stated as follows in the recent edition (1879) of Professor Lorimer's excellent treatise on the Law of Scotland: "1349. The tenant has no right to kill game without permission from the landlord (Bell's Prin. 953; *Marquis of Tweeddale*, June 18, 1808, F. C.; *Earl of Hopetoun*, January 17, 1810, F. C.; *Ronaldson*, November 21, 1804, M. 15270; *Wemyss*, December 2, 1847, 10 D. 194; 6 Bell, House of Lords, 394); [not even under a 999 years' lease (*Wellwood*, 1874, 1 Rettie, 507);] but it has been found that he may be entitled to damages against the landlord, on the ground of the latter having increased the game on the farm beyond a fair average stock (*Wemyss* v. *Erskine*, December 2, 1847); [and this claim will not be absolutely barred by a stipulation in the lease that the tenant shall have no claim whatever for any damage he may sustain from game, provided he can still show substantial damage from excessive increase thereof (*Cadzow*, 1876, 3 Rettie, 666).] Whether the tenant can obtain an interdict against the landlord increasing the game beyond the average quantity when he took the farm is still a question. (See *Wemyss* v. *Gulland*, December 2, 1847.) 1350. The tenant is not entitled to scare the game away by discharging firearms loaded with blank-cartridge, or by hunting them with muzzled dogs. (*Wemyss, supra, per* Lord Justice-General.)" So far as regards game; but in the next paragraph (1351) it is said, "Rabbits are not game" [*sed vide* 25 and 26 Vict. c. 114, not cited]; adding, "and a tenant is entitled, without consent of his landlord, to kill them for the protection of his crops. (Hunter, ii. 183; *Moncrieff*, February 13, 1828)."

The following additional cases will serve to throw some further light on the subject, so far as regards rabbits. *Golds* v. *Sir A. D. Stewart* (October 15, 1875, 20 *Journal of Jurisprudence*, 49) was an action by tenants against a landlord for damage sustained through their crops being destroyed by an excess of rabbits, etc., which the defender had wrongously preserved on the estate. The

pursuers held under a lease reserving all game, rabbits, etc., with the exclusive right of hunting, shooting, and coursing, "but the roe, hares, and rabbits to be kept down so as to prevent all cause of complaint by the tenants, and in the event of their not being so kept down the proprietor shall be bound to pay compensation to the tenants for the damage done to the crops on said lands." There the case resolved itself into a mere assessment of damages; it being observed that "every rural tenant, whether game be reserved or not, must expect, and be content to receive damage to some extent, and it is only where the excess is unusual that he has good cause of complaint and redress," adding that the action "is of a class which fortunately, and much to the credit both of landlords and tenants, is now extremely rare in this country" (Perthshire). *Young* v. *Duff* (March 22, 1876, 20 *Journal of Jurisprudence*, 223) was another action by tenants against their landlord for damage done to their crops by rabbits, through over-preservation on the part of the defender. In the judgment it was said: "The rabbits on the farm are not reserved, and therefore it is in the first place the duty of the tenants to protect their own crops from injury by them. When rabbits are reserved by the lease to the landlord, it is his business to see that they do not increase; but when they are not reserved, rabbits are in the position—so far as the tenants are concerned—of wood-pigeons, crows, or rats, or of any species of vermin which may destroy crops, and the tenants are at liberty and bound to do whatever is necessary to protect themselves from them." It had been contended that this would not free the defender because the rabbits came from a cover to which the tenants had no right of access; but as to this it was said: "If a landlord makes covers which do not exist at the date of the lease, or if by some act or neglect he unduly increases the quantity of rabbits in an existing cover, he may, by altering the date of possession, and by rendering it more difficult for the tenant to protect himself, make himself liable for damages. But where a tenant takes land alongside an existing cover, he knows, and must lay his account with the fact, that it is an impossibility to prevent the wild animals which harbour in it from coming upon his farm, and that from accidental circumstances they may at one time be more numerous than at another. That fact must be well known to him when he takes the lease, and the land adjoining the cover is accordingly worth so much the less rent. Before, therefore, the tenant can complain of damage from the cover, he must show that the wild animals in it have increased through some act or neglect of the landlord's since the lease was taken." Such act or neglect it was found there was none, and the pursuers failed accordingly. In fact, the mischief there complained of seemed to have been mainly caused by a mistaken idea, on the tenants' part, that they were not at liberty to help themselves; and, as it was said, "they seemed to have thought themselves entitled to stand by and claim for whatever damage was done, exactly as

if they had been prevented from killing the rabbits." The right of a farmer to kill rabbits is further exemplified by *Orr and Hardie* v. *Lee* (February 28, 1877, 21 *Journal of Jurisprudence*, 234), where a landlord, under a lease not reserving rabbits, sought an interdict to have his tenant prohibited by himself, or by others employed by him, from scaring or alarming the *game* on the farm, or driving them away therefrom, by entering on the ground with dogs or guns, and hunting or shooting thereon—the matter complained of being that the game had been frightened away by the operation of shooting the rabbits on the farm. The interdict was refused, and we quote the following passages from the judgment: "There is no room for question as to the legal rights of the respondent to kill the rabbits, which are not reserved in the lease. This point was decided by the case of *Moncrieff* v. *Arnot* (February 13, 1828, 6 Sh. 530), and it has since been regarded as settled in several cases before the Superior Court. Neither can it be doubted that the respondent was entitled to delegate his right to others. The right in a tenant so to delegate his power of killing rabbits has been exercised in several cases without question, and it is clear that if it were otherwise the mere personal right in the tenant would be of little value, when the farm—as in this case—was extensive." "The Lord President, in the case of *Inglis* v. *Moir*, 7th December 1871, describes the killing of rabbits by a tenant as an 'ordinary agricultural operation,' and it can hardly be seriously maintained that so long as a tenant is acting *in bona fide* he is to be interfered with in such an operation, because it may have the result of starting a hare from its form, or sending a covey of birds across a march. It is evident, moreover, that many other agricultural operations besides that of killing rabbits would have an effect as great, or even greater, in this direction. Had there been reasonable ground for supposing the respondent acted in the manner he did *for the purpose* of scaring and driving off the game, the case would be different" (citing *Wemyss* v. *Gulland*, 10 D. 204). "The respondent has a legal right to enter on his farm with dogs and guns for the purpose of killing vermin, and it would be intolerable that he should be called upon to answer for breach of interdict whenever it suited the petitioner to show that his operations had had the effect of disturbing the game." But in *Calder* v. *Graham* (February 19, 1879, 23 *Journal of Jurisprudence*, 221) an interdict was granted, prohibiting a tenant from killing rabbits, as they had been reserved under his lease, whereby also he renounced all claim for damages they might occasion; but it was expressly affirmed that "*at common law* a tenant farmer, either by himself or another, may shoot down rabbits as vermin for protection of his crops," at the same time that "whatever be a tenant's rights at common law, and however monstrous and inequitable the clause of prohibition in the lease, yet, if a tenant agrees to such a covenant, he cannot at his own hand violate the prohibition." Lastly, in

Craig v. *Williamson* (February 16, 1879, 23 *Journal of Jurisprudence*, 268), also, the rabbits were reserved by the lease to the landlord, with the sole right of hunting, and the tenant was to have no claim against him for damage; but it was further provided that the landlord was not to allow the rabbits to increase to any injurious extent beyond the stock thereon at the time of entry under the lease, declared "to be so small as not to occasion appreciable damage," and that he should use means to prevent such increase, and that, should the tenant at any time intimate that he considered the rabbits were increasing to an injurious extent, the landlord should be obliged to kill them, so as to remove all just cause of complaint, and that any disputes as to the rabbits should be settled by arbitration. The suit was brought to oblige the landlord to enter into a submission to arbitration in reference to an injurious increase of the rabbits. It was held unsustainable, on the ground that an undertaking to refer future disputes arising out of an alleged breach of contract is not obligatory where the arbiters are not named; but, it was added, "if the fact be as the pursuer alleges, that the defender has allowed the rabbits to increase to his damage, the ordinary remedy is open to the pursuer," there being nothing in the lease to confine the settlement of the question to arbitration. This case occurred in Perthshire, as did also the case of *Calder* v. *Graham*, so that it would seem that county has no particular cause to boast of the immunity from this class of actions claimed for it, as we have seen, in *Golds* v. *Stewart*, but well may we add that, in the words of the judgment there delivered, "the rarer it is the better for the good feeling and mutual interests between those classes on which depends so greatly the prosperity of the land."

[We extract the above from a recent number of the *Irish Law Times*. It may be well, however, to warn our Irish friends not to depend too much on the judgments delivered in Sheriff Courts, as, though often extremely able and generally very sound decisions, they have not that authority which the *dicta* pronounced by the Judges of the Supreme Court possess. We do not by this mean to under-value in the slightest degree judgments pronounced in the Sheriff Courts; we merely wish to point out that a reported decision of the Court of Session must be held as ruling any point, whatever views different Sheriffs may have taken on the subject. —ED., *Journal of Jurisprudence*.]

Reviews.

Traité Elémentaire des Successions à Cause de Mort en Droit Romain. Par Alphonse Rivier, Professeur à l'Université de Bruxelles, Associé de l'Académie Royale de Belgique, Correspondant de l'Académie de Jurisprudence et de Legislation de Madrid, de l'Institut National Genevois, Membre Honoraire de la Société Suisse de Juristes. Bruxelles: Gustave Mayoley. 1878.

IN this elementary treatise M. Rivier has stated with clearness and brevity the principles of Roman law relating to testate and intestate succession, and the student will find much assistance from his pages in entering upon the examination of this important branch of the law. Annexed to each paragraph M. Rivier places well-chosen passages from the classic jurists and imperial constitutions in support of the propositions which he has extracted from them, while references to Ruchta, Vangeron, Vering, and other learned writers enable the student who is anxious to acquire a more minute knowledge of the law of succession to consult these authorities without loss of time, and to use M. Rivier's book as a text-book which points them at once to the sources of the law, and to the best commentaries on each of its divisions. M. Rivier's propositions are generally stated with great accuracy, and even where an occasional want of precision is apt at first to mislead the reader, the appended quotation from the code or digest clears up the difficulty. Thus, in speaking of the mode of execution of a will by a blind man, he says "that there must be present an eighth witness or a notary, but the constitution of Justinian at once shows that the eighth witness was only permitted when it was impossible to secure the presence of a notary, and then not as a witness, but as acting in place of a notary." In reading this treatise one could not help feeling the difficulty with which the writer of an elementary work has to contend in stating the legal rules which prevailed at successive periods from the time of the laws of the Twelve Tables to that of Justinian. It is scarcely possible to prevent some confusion from arising, though M. Rivier has avoided it to a great extent. At the same time we think that the clearness of the book would have been increased by a short historical narrative of the changes in the law of succession as well as of the changes in society out of which the changes in the law sprung. The rules regulating intestate succession are too often looked at without reference to the customs of family and tribal life on which they depend for their justification, and many writers discuss various laws of succession as if they were referable to an ideal standard instead of being judged of in relation to the state of society in which they exist. No law of succession can be

thoroughly understood if the civilization of the time be not first understood, and no modification of laws of succession is likely to be beneficial in which the prevalent customs of the people are not kept in view. A few notes showing the connection between the progress of Roman civilization and the alterations in the branch of the law treated of by M. Rivier would have proved of great help to the reader, and could be easily added without detriment to the general plan of the work.

A Manual of the Law relating to Shipping and Admiralty as determined by the Courts of England and the United States. By ROBERT DESTY, author of "Federal Procedure," "Federal Citations," "Statutes relating to Commerce, Navigation, and Shipping," etc. San Francisco: Sumner, Whitney, & Co., 1879.

Mr. Desty in a prefatory note thus describes his work in terms borrowed from the language of the settlers and gold-diggers of California: "Regardless of traditional forms, the author has endeavoured to put the result of his labours into the smallest space with the most convenient arrangement, prospecting in old fields, exploring unbeaten paths, and blazing the way for short cuts by those who seek with anxious haste for new or ancient treasures;" and the publishers, not to be outdone in metaphor, say, "The keys which we carry to-day are smaller than those of our ancestors, and it is well, for civilization has made them necessary. Mr. Desty has made a handy little passkey to the law of Shipping and Admiralty, which you may carry in your pocket."

Mr. Desty has digested into 448 paragraphs the law of shipping as it is to be found in the decisions of English and American Courts, very full references to which he appends. So far as his statements are supported by English authorities, this manual may be useful to the practitioner, but the amount of authority to be given to the various American Courts to whose decisions Mr. Desty refers cannot well be estimated by lawyers in this country; there is need of caution in founding on them, except for the purpose of showing what has been decided in American Courts. Few, too, of the American reports are to be found in the legal libraries of Scotland, and references lose great part of their value when the reader cannot consult the reports themselves. This manual is well arranged, and the law is stated generally with sufficient clearness and precision. There are, however, some exceptions, the paragraph upon demurrage, *e.g.* fails to explain the stringent character of the obligation upon the merchant to load or unload within the stipulated lay-days. The distinction, again, between the responsibilities of a common carrier and a shipowner is not brought out as it ought to be in paragraph 263.

The Erection of Parishes Quoad Sacra; *and the Feuing of Glebes under Authority of the Court of Teinds.* By NENION ELLIOT, S.S.C., Clerk and Extractor of the Court of Teinds. Edinburgh: T. & T. Clark. 1879.

Mr. Elliot has written a thoroughly practical book on a little-known subject, and we have no doubt that it will be of the greatest assistance to many agents to whom teind practice is somewhat of a *terra incognita*. After a short introduction relating to the Court of Teinds the author proceeds to treat of the erection of parishes *quoad sacra*, giving the various kinds of parishes or churches which may be dealt with, and the procedure in Court in erections *quoad sacra*. The patronage and rights of presbyteries are then very briefly—perhaps too briefly—noticed, seat-rents and special collections being next considered. The second part of the book deals with the feuing of glebes, and much useful information is given as to the procedure in applications for authority to feu, the feu-charters, the rights of conterminous proprietors, and other kindred topics. In a lenthy appendix, which occupies nearly half of a very slender book, there is given the Act of 1844, with the amending Acts of 1866, 1868, and 1876, relating to the erection of parishes *quoad sacra*, and under which Acts three hundred and thirteen parishes have up to the present time been erected; a list of the names of these parishes, with the date of their erection, is also given. A variety of forms of deeds, etc., incident on the erection of parishes *quoad sacra* are annexed, and cannot fail to be useful. Another appendix deals in a similar way with the feuing of glebes; the Act of 1866, which authorizes glebes to be feued, is given, and specimens of feu-charters, building leases, etc., are appended. Mr. Elliot writes with evident knowledge of his subject, and has contrived to put into a very small space a great deal of exceedingly useful information. In his desire to be brief he has now and then not entered so fully into the subject as we should have liked, but what he has done he has done thoroughly well.

Report of the Trial of the Directors of the City of Glasgow Bank. By CHARLES TENANT COUPER, Advocate. Edinburgh: The Edinburgh Publishing Company. 1879.

Though late in the field, this Report of the Bank Trial excels by far all its predecessors, and will remain the authoritative and standard reference on the subject in time to come. It appears in the form of a handsome octavo of nearly 500 pages of close but clear type. The speeches and opinions have been revised by the respective counsel and judges, and the Lord Justice-Clerk has himself revised the charge to the jury. Besides the proceedings at the trial itself there is also given a full account of the procedure upon the petition for bail which was presented on the 14th of November last. The most interesting feature of the book, however,

is undoubtedly the *facsimiles* of the scroll abstract balance-sheets for 1876, 1877, and 1878. These are marvels of lithography, having been reproduced so accurately that every correction and pencil-mark even of the minutest kind is shown on them. To the public at large we fear they will appear as mere confused masses of figures, but it is deeply interesting to be able to see how such a board as the City of Glasgow Bank directors arranged their balance-sheet, and it tends not a little to the clear understanding of much of the proceedings in the trial itself. The report of the investigators into the affairs of the bank is also given in an appendix. Mr. Couper has evidently bestowed great pains and labour on the volume, and we may congratulate him on having produced a report which for fulness of detail, and, so far as we have been able to judge, accuracy of information, leaves nothing to be desired. The printing and paper of the book are alike excellent, and make it undoubtedly the most sumptuous and elaborate report of any Scottish trial which has yet appeared.

The Month.

MR. ALEXANDER RUTHERFORD, Solicitor, Galashiels, has been appointed Sheriff-Clerk of Selkirkshire, in room of Mr. P. S. Lang, who, we believe, has resolved, to the regret of his numerous friends here, to commence life in Australia, where he has many family ties.

Procurator-Fiscal of Stirlingshire.—We understand that Mr. Patrick Welsh has been appointed to the office of Procurator-Fiscal of Stirlingshire, vacant by the death of Mr. Robert Campbell. Mr. Welsh previously held the position of Procurator-Fiscal Depute of the county.

Summer Vacation.—The Court of Session will rise on Saturday the 19th inst. for the long vacation.

Report by the Committee of the Faculty of Advocates on "A Bill to amend the Law regarding the Property of Married Women in Scotland."—This Bill, which is now before the House of Commons, proposes to effect an important change in the law of Scotland as to husband and wife,—by abolishing the *jus mariti* and husband's right of administration; and the Committee recommend the Faculty to oppose it.

According to this Bill all the personal estate of a married woman, whether had before marriage or acquired during marriage, is to be her separate estate, exempt from *jus mariti*, "unless and until the same is *reduced into the husband's possession*"—(whatever that means); and, although it has been "reduced into possession," it may be taken out of it at any time, and invested in the wife's name, and then it becomes her

separate estate. The rents of her heritable property are in like manner to be her own exclusive property, exempt from the *jus mariti* and right of administration of her husband. Further, the property to which a wife succeeds *ab intestato*, or acquires by bequest, whatever be the amount, is to be her own separate estate. This goes far beyond the English Act, which limits to £200 the sum which is to be the wife's separate estate when the money comes to her by bequest.

These are the main provisions of the Bill. But there are others requiring separate notice, and to which attention will be directed in the sequel.

It is obvious, that a law like this entirely changes the property rights of husband and wife, very much to the detriment of the former. According to the common law of Scotland the husband must bear the burden of the family expenditure; and as a consequence of this, the personal estate of the wife is transferred to him, to be administered for behoof of the family, she at the same time obtaining, besides maintenance, and her husband's position and rank during his life, important patrimonial interests on his death. This law is one which experience has proved to be founded upon a rational and prudential basis. No doubt there are exceptions—which prove the rule—of husbands who do not fulfil their duty of supporting the family, and who at the same time squander the means they obtained through their wives. How far the law of Scotland gives protection to wives, in such cases, will be immediately explained. But these exceptional cases constitute no ground for reversing the law, and for leaving upon the husband the burden of the family support, while reserving to the wife entire power over her own means, without any obligation upon her to contribute to her own maintenance or that of her children—and still less of her husband.

The Bill has been framed professedly upon the lines of the English statute, but it ignores the difference between the laws of Scotland and England in their mode of dealing with the property rights of married women. According to the common law of Scotland, a wife is entitled, under the name of *jus relictæ*, at her husband's death, to one-half of the whole of his personal estate if he have left no children, and to one-third if he have left children. According to the law of England, a widow has no such claim. The rights of the Scotch widow in her *jus relictæ* cannot be defeated by any will left by her husband. An English husband, on the other hand, can bequeath his whole property according to his pleasure, uncontrolled by any claims on the part of the widow for *jus relictæ*, or on the part of children for *legitim*.

The law of Scotland was still farther favourable to a wife until the year 1855, in giving to her next of kin one-third or one-half (according as she had or had not children) of the personal estate of her husband, if she should predecease him. Upon this one-third (or one-half) of her living husband's personal estate she could test; and thus it frequently happened that a moiety of a tradesman's stock in trade was carried off by the wife's next of kin, to his ruin. The law operated so harshly against the husband, that the Legislature, by the Act 18 Vict. c. 23, abolished this claim of the wife's executors, which was called "the wife's share of the goods in communion"—still, however, retaining the *jus relictæ*.

But there is a further right which a widow possesses in her husband's

property, which he cannot defeat, viz. her terce, or right to the one-third of the rents of the heritable estate during her whole widowhood.

Now, while the wife has all these rights in her husband's estate, it is proposed to reserve to her besides, all the estate which she had at marriage, or might acquire at any time, together with an absolute power of disposing thereof. Her husband is to have no interest in it during her lifetime. He cannot compel her to contribute any part of it for the support of the household. She may keep up, if she think fit, a separate establishment with it; and when she dies, her husband will not succeed to it; it will all pass to her next of kin, however remote. In this respect it is proposed to put a Scotsman in a less favourable position than an English husband is placed; for, according to the English law, where a wife dies possessed of personal property, not vested in the husband, he is entitled, if he be the survivor, to obtain letters of administration to it, and to apply the same wholly to his own use.

When, therefore, it is proposed to give these extraordinary rights to a Scottish wife, there ought to be corresponding obligations placed upon her, and corresponding remedies should be given to the husband. In the *first* place, the husband should have the power over his estate, of bequeathing the whole of it as he pleases, without any right on the part of his wife to *jus relictæ* or to terce; or, *secondly*, if we are not prepared to abolish the *jus relictæ*, a corresponding right should be given to the husband in the wife's separate estate (which she should have no power to defeat), to the extent at least of one-half, and in the event of her dying intestate he ought to obtain the whole, as in the English law. *Thirdly*, a woman having such separate estate, and allowed now, under "The Married Women's Property (Scotland) Act, 1877," to carry on trade on her own behalf, ought to be made compellable to contribute, in proportion to her means, to the family expenditure—an obligation which this Bill does not propose to place upon her, but which surely is nothing more than the counterpart of the privileges which she is now to receive.

Along with the misleading tendency of a reference to the English law, there has been used in support of this Bill an argument frequently urged —that it is intended to effect nothing more than what is done by rich people, who, having means, enter into antenuptial marriage-contracts. It is said that in all these contracts, when the woman has money, the *jus mariti* is carefully excluded; and this is quite true in the majority of cases. But then this exclusion is counterbalanced by stipulations in the husband's favour. The wife's money is often settled upon the children of the marriage in fee; but the husband in every case obtains at least a liferent of it, if she should predecease; sometimes, indeed, he obtains the fee of the whole or of a part; sometimes the power of disposal of it. All this is matter of bargain; and the provisions by the husband in favour of the wife, under the marriage-contract, are enlarged or restricted according to the fairness and generosity or the harshness and unreasonableness with which he is treated. But in providing for the case of no contract the law should continue to assume a community of interest between husband and wife; under no marriage-contract would a husband be left so utterly helpless as he would be, if this Bill became law, whereby during marriage he would be unable to obtain any part in the enjoyment of his wife's means, except through her favour; and after her death the whole of it would be carried away from him.

Our law has not left a married woman without sufficient protection, so far as regards property coming to her, either in the case where she and her husband live in conjugal happiness, or where she is afflicted with a bad husband who deserts or ill-uses her. *First*, the 16th section of the Conjugal Rights Act, 1861, has a very careful and specific enactment in regard to the case "when a married woman succeeds to property, or acquires right to it by donation, bequest, or by any other means than by the exercise of her own industry." In such a case the wife is entitled to demand that "a reasonable provision for her support and maintenance" be made; and, what is reasonable, is to be determined by the Court with reference to any provisions previously secured to her, and with reference to the amount of any separate estate which she may then possess. It would be preposterous to give an additional provision to a wife who had already a separate estate of her own of £1000 a year; and therefore the statute wisely declared that the amount of the fund which shall be set aside for her, and not passed into the husband's possession, for the support of the family, shall be proportioned to her necessities. All this, however, is now to be changed; there is to be no longer any inquiry as to whether the wife needs the money to which she succeeds, or which has been gifted to her, or acquired "by any other means." The whole is to be handed over to her, according to the present Bill, without any restriction whatever, and without any obligation of rateable contribution.

Secondly, the earnings of a wife by the exercise of her own industry, which by the Conjugal Rights Act were not included as a fund from which she could demand a provision, but were intended to pass to the husband along with his own, to meet the family expenditure, have now, however, all been handed over to her by the "Married Women's Property (Scotland) Act, 1877." This statute enacts, that "the *jus mariti* and right of administration of the husband shall be excluded from the wages and earnings of any married woman, acquired or gained by her in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name, and shall also be excluded from any money or property acquired by her through the exercise of any literary, artistic, or scientific skill." Thus a married woman may open a shop, separate from her husband, and carry on a trade. She may make her husband her servant therein, and employ him as her shopman, or traveller, or porter, at weekly wages. It is not clear whether the husband is not liable for payment of her debts; and it is an open question whether she can set agoing the trade and keep the shop without his consent, leaving him to take charge of the children and superintend the domestic *ménage*.

These provisions deal with the case of husbands and wives who are living together in amity, and go very far indeed in favour of the wives. With regard to the cases where the wife is ill-used, she has very effectual remedies. Where the husband *deserts* her, she may apply, under the Conjugal Rights Act (sec. 1) for an order to protect her property, and having obtained such order, all the property which she has, or may acquire *by her own industry*, or which she may *succeed to*, is her separate estate, and cannot be touched either by her husband or his creditors. Again, if the husband ill-uses the wife, she is entitled to obtain judicial

separation; and it is declared by the 6th section of the Conjugal Rights Act that the effect of such decree shall be, that "all property which she may acquire, or which may come to or devolve upon her, shall be held and considered as property belonging to her, in reference to which the *jus mariti* and husband's right of administration are excluded."

It might have been thought that these statutes conferred a protection as ample, and gave rights to married women as extensive, as was consistent with maintaining the conjugal relation at all. When it is proposed to go beyond this, as is done by the present Bill, the tendency of the legislation is to make marriage a contract of partnership, like an ordinary civil contract in regard to business, with this only difference, that although the parties have separate interests, the contract cannot be dissolved at pleasure. Both the *socii*, however, may be the managers of separate and distinct estates. The policy of all laws in civilized states has endeavoured to prevent such a condition of things as this. The attempt to give to a wife a *status* of practical independence might conduce to her vanity, but not to her happiness, or to the comfort and wellbeing of her household.

The Bill is open to still further objections. With the view apparently of intimating that it is intended to do for Scotland no more than has been done for England, the second section runs as follows: "Sections two, three, four, five, and six of the second recited Act shall apply to Scotland." The Act referred to is the English Act 33 and 34 Vict. c. 93, and accordingly we must refer to that Act to find out what is intended. It becomes necessary to examine these sections.

(1.) The second section of the English Act provides that deposits in savings banks by a married woman are to be deemed her separate property. But the section contains a proviso under which, in the event of a married woman making a deposit by means of moneys of her husband, without his consent, he may apply to the Court of Chancery, under section 9, to have such deposit or annuity paid to himself, yet section 9 is not adopted, nor does the Bill contain any provision similar thereto.

(2.) Under section 3 of the English Act a married woman's property in the "Public Stocks and Funds" may have it transferred to her name to her separate use, subject to certain restrictions. But what is meant by the "Public Stocks and Funds" as copied from an English Act into a Scotch Bill? By the Metropolitan Boards of Works (Loans) Act, 1871, 34 and 35 Vict. cap. 47, section 14, this section is, as regards the Governor and Company of the Bank of England, excluded and made applicable to "Metropolitan Consolidated Stock." But would this latter stock be regarded in Scotland as included under "Public Stocks and Funds"? And why should not the provision be made to apply to stock of the Bank of Scotland? As in the previous section also, an application may be made to the Court of Chancery under section 9, but section 9 is not adopted.

(3.) Section 4 of the English Act deals with the case of a married woman's property in a Joint-Stock Company, and which, if the shares are fully paid up, may be registered in her name and to her separate use. An examination of the Act makes it manifest that the framer intended the provisions of this section to be worked out, both under section 9 and section 11 of the English Act; the former dealing with the case of a wife making an investment of her husband's moneys in her own name,

without his consent, and the latter enabling a wife to compel a Joint-Stock Company to investigate the title to shares, and (unless they can show a flaw in the title) thereafter to register such shares in her name to her separate use. (See *Reg.* v. *The Carnatic R. Co.*, L. R. 8, Q. B. 299.) Accordingly, to adopt section 4 without also adopting sections 9 and 11, or otherwise making similar provisions applicable to Scotland, leaves the Bill unworkable, as, having regard to section 9, the husband would be left without a remedy; and having regard to section 11, the wife would be left without a remedy. The 6th section of the Bill, which declares that any question arising under it may be determined in the Court of Session or Sheriff Courts, does not obviate this objection. That clause would be implied if not expressed, and merely means that questions arising under Acts of Parliament shall be heard and determined by the courts of law.

(4.) Section 5 deals with the case of a married woman's property in a society, enabling her to have the shares or debentures registered in her own name to her separate use. Here again there is a proviso for an application to the Court under section 9.

Seeing that the Bill has adopted so much of the English Act, it is matter of surprise that section 11 has not also been adopted. It is in some respects the most important provision of the English Act. It enables a married woman to maintain an action in her own name, both with regard to moneys and property, declared by the Act to be her separate property, and with regard to moneys and property belonging to her before marriage, which the husband shall, by a writing under his hand, have agreed shall belong to her after marriage, as her separate property; and she is to have the same remedies, both civil and criminal, for the protection of such property as if she were an unmarried woman.

It appears to the Committee that if the Bill is proceeding on safe ground in adopting many sections of the English Act, it ought not to stop short of adopting this section, or something like it; yet if adopted the results would be somewhat startling, and eminently suggest the advisability of not dealing with this branch of law at all, unless in a comprehensive scheme, where a due regard will be had to the effect of each provision upon the whole system, and with reference to the peculiarities of the law of Scotland.

The language of section 11 gives to her "all remedies civil and criminal against all persons whomsoever," for the protection of her "wages, earnings, money, and property." This is wide enough to enable a woman to proceed criminally against her husband, where necessary, for the protection and security of her separate property. No doubt a theft by a husband might be difficult to prove, but the remedy seems nevertheless available. If an English Court granted such a remedy it would only be doing what has already been done in America; but are we ready to adopt in Scotland this novel kind of legislation? In Texas a husband may be guilty of theft of the wife's separate property if, though undivorced, he lives separately from her. (See Wells' Separate Property of Married Women, 1878, p. 104.) Nor have the American lawyers hesitated in some States to follow out the logical results of the doctrine of separate property, separate ownership, and separate actions at law. Thus it has been held that a husband may become his wife's tenant, and it is for the

jury, and not for the Court, to determine the character of his possession of her lands; and it is a moot question in America whether a wife may not claim wages or earnings for the discharge of her domestic duties.

It is unnecessary, however, to follow this matter farther. It has been considered proper to offer the foregoing criticisms on some clauses of the Bill. But the objections to it lie deeper. The abolition of the *jus mariti* and husband's right of administration would be a mistake, and would be productive of pernicious social results. The Bill is framed upon a misapprehension of the rights and privileges which a wife at present enjoys according to the law of Scotland.

The Committee have to add that one of their number, Mr. John M'Laren, dissents from the foregoing Report, and thinks that legislation is imperatively called for in the direction proposed by the Bill. He is of opinion that the separation of the estates of husband and wife would not produce any anti-social consequences, and in the event of the husband's insolvency would be attended with great benefit to families; that, in short, the Bill, so far from introducing a new principle, merely gives legislative sanction to a practice, existing widely in the upper and middle classes in Scotland, of having antenuptial contracts of marriage, which generally exclude the *jus mariti*, and fix the husband with a liferent of his wife's estate in the event of his survivance. In Mr. M'Laren's opinion the purpose of the Bill is not to regulate the rights of the heirs of spouses, but the rights of spouses themselves during their joint lifetime. He therefore holds that, to compare and contrast the different modes of distribution of the spouses' estates in England and Scotland, after the dissolution of the marriage, is an unsound mode of argument. Further, he holds that as the rents of the wife's real estate and the interest of her money are protected by law in England against the husband's creditors, so equally they should be protected in Scotland, the difference presently existing between the two legal systems not turning on any peculiarity of national usage or sentiment, but being arbitrarily caused by modern legislation. Mr. M'Laren accordingly proposes to bring about uniformity in the laws of England and Scotland as to the rights of the spouses during marriage, and at the same time to alter (if thought necessary) the law of succession in Scotland in the interest of the spouses or the family. In the matter of moveable estate, Mr. M'Laren, while admitting that the Bill as it stands would be productive of inequality in the respective rights of the spouses, is of opinion that the objections on this head would be obviated by the addition of a clause providing that, in the event of the husband's survivance, his right and interest in the wife's estate shall be coextensive with the right and interest at present given by the law of Scotland to a wife in her husband's estate in the event of her survivance. Lastly, Mr. M'Laren thinks that there is no good objection to the way in which the Bill proposes to extend to Scotland the principle and certain of the clauses of the English Act. Not only, in his view, may these clauses be legitimately imported by reference, but the objection taken by the Committee that they refer to other sections, particularly section 9, of the English Act (dealing with the matter of remedies), which sections are not imported, is met by clause 6 of the Bill, making provision for remedies in Scotland. As to section 11 of the English Act, conferring on the wife certain rights of

action civil and criminal, Mr. M'Laren desires it to be explained, that the reason for its omission from the Bill is, that it is not required, a wife having by the existing law a right of action against her husband in relation to her separate estate; and as to criminal remedies, that in Scotland these are left in the hands of the criminal authorities.

A Debtor's Letter.—Apropos of the letter from an impecunious debtor in America which we published last month, an esteemed contributor sends us the following correspondence, which may amuse our readers. The parties were well-known citizens of Glasgow in the early part of the century:—

St. Andrew Street, Glasgow,
11*th February* 1823.

Dear Sir,—Mr. —— has applied to me regarding a small account due by you to him. You had better settle, otherwise the *Philistines will be assuredly on you.*—Yours truly,

G—— B——.

Answer.

Glasgow, 12*th February* 1823.

My dear Sir,—I have this moment received yours. Your allusion to the story of *Samson* is happy, and perhaps somewhat applicable. Both you and I know well that the *Philistines are a very ferocious people.* I shall not say that quite so many as 300 *foxes with firebrands on their tails* have been let loose among my corn, but certain it is grievous and distressing mischiefs and disappointments and vexations have been thrown in my way, and unexpectedly (as you well know), which have prevented my having as yet furnished to our worthy mutual friend the whole quantity of *sheaves* to which he is justly entitled. But I have some other growing crops rapidly coming forward, and as these *ripen*, the whole *sheaves* in full detail shall be rendered to our friend, and that ere long, though perhaps *sheaf by sheaf.* Like Samson, I have sometimes been obliged to *grapple with lions*, as well to climb up hills and precipitous places, and that too with exceedingly *ponderous loads on my shoulders.* Sometimes also attempts have been made to *bind* and *trammel* me, and to cut off my hair or some appendages on which perhaps my strength may have been supposed to depend. On some of these occasions my fears may sometimes have suggested the appalling passage you have quoted, that "*the Philistines would assuredly be upon me,*" and yet I have hitherto been able to stand my ground. I have not been devoured by *the lions*, or tumbled down the *precipices;* nor has my *back been broken* with the too heavy loads laid upon it; and though my hairs or appendages have occasionally been clipped, which of course may have abated my strength, yet still some remain, and though snuff or snuffings have occasionally been

thrown in mine eyes, which may sometimes have bedimmed and smarted them a little, yet they are not altogether put out. I can still see my way a little, and hope that I shall ultimately, and that ere long, be able to pull down the temple of Dagon, and get the better of the Philistines without either *crushing myself or destroying them* in the accomplishment of this great achievement. It is a great matter to have one *staunch friend*, and I flatter myself I have one in *you*. Assure our worthy friend that ere long the promised sheaves will be delivered to him. Pledge yourself to him that as an able agriculturist you will do everything in your power to promote and accelerate the growth of my corn, and lend a helping and efficacious hand towards producing a plentiful harvest to your friend, and believe me to be ever yours truly,

J—— G——.

Uncertificated Legal Practitioners.—We are glad to see that the recent discussion amongst the Glasgow procurators as to the unauthorized agents who are in the habit of appearing in the Sheriff Courts there has not been without use. Two cases came before Sheriff-Substitute Lees the other day, which the newspapers report as follows:—

The first was at the instance of John M'Turk, flesher, against William Cross Mackie, sheriff officer, 48 Dundas Street, for £2, which the defender demanded from pursuer under a fictitious name in a house situated in St. James Street, Paisley Road, under the name or title of William Campbell, writer there. The pursuer states that he was induced to call upon the defender in consequence of observing an advertisement in the Glasgow papers that parties requiring legal advice could be advised by the said William Campbell, who had a brass plate on his door as William Campbell, writer. On the faith of the defender's statement that he was a writer, instead of only a sheriff officer, the pursuer, who was then a total stranger in Glasgow, handed to the defender a copy of an Ordinary Court action raised by Mr. Tennent, one of the members of Parliament for Leeds, against him. Since then the pursuer discovered that the defender was only a sheriff officer, and could not do any legal work for the pursuer, who had thus been flagrantly imposed upon. Defender had been repeatedly called upon to repay the money, but he had superciliously refused or delayed to do so. Defender did not appear, and decree in absence was granted in favour of the pursuer.

At the same diet a case came before his Lordship, which indicates to what extent sheriff officers sometimes overcharge their accounts. The action was raised by Alexander Forson, sheriff officer (presently under suspension), 44 Hutcheson Street, against John Moss, accountant and house factor, Waterloo Street, Glasgow, concluding for £1, 3s. 3d., being the balance of an account for professional services rendered by the pursuer on behalf of the defender. The account in the first instance amounted to £3, 3s. 3d., which the defender considered to be overcharged, and paid the pursuer £2, who immediately raised an action for the balance. When the case came up the first day the Sheriff sent the

account to the auditor to be taxed, and yesterday the report showed that the auditor had taxed off £1, 5s. 10d., so that instead of having to pay £1, 3s. 3d., the pursuer had to receive 2s. 7d. from the defender. Forson asked his Lordship to remit the account to the auditor to be taxed over again, as the finding was entirely wrong. The Sheriff: "Leave the bar, sir, and be thankful that I have not handed you over to the Sheriff-Principal." His Lordship afterwards complimented the pursuer on resisting the account.

The Scottish Law Magazine and Sheriff Court Reporter.

ABERDEEN SHERIFF COURT.

Sheriff COMRIE THOMSON.

FARQUHARSON v. MACQUEEN.

Feu-charter—Obligation on singular successor.—Sheriff Comrie Thomson gave judgment in an action at the instance of Peter Farquharson, Lynn House, Aberdeen, in which he sought to recover from Alexander Macqueen, Holburn Place, the sum of £11 sterling, being the expense of paving opposite Mr. Macqueen's house. Mr. Macqueen's property was part of a large block of ground fued out by Mr. Farquharson from Mr. James M'Gregor Allan in the year 1875. Mr. Farquharson built houses on the ground and sold one of them to the defender. From the feu-charter in favour of Mr. Farquharson, it appeared that the superior had paid the expense of paving, and had taken Mr. Farquharson and his disponees bound to repay him the amount of the cost of the paving within three years of the date of the feu-charter. When Mr. Farquharson sold to Mr. Macqueen, the superior was still without repayment of the cost of the paving. The disposition in favour of Mr. Macqueen declared that it was granted under an express burden of all the provisions and conditions mentioned in the original charter, and Mr. Farquharson's contention in the present action was that the obligation to pay the superior for the pavement was thereby transmitted to the defender.

The contention of the defender was that Mr. Macqueen was entitled, in accepting the disposition in the terms which he had done, to assume that the expenses of paving had been repaid to the superior, the obligation being for payment of a single sum and not for one extending over a series of years.

The following is Sheriff Comrie Thomson's interlocutor:—

"The pursuer here seeks to recover a sum of money which is said to be the proportion of the expense of the pavement opposite the property in Holburn which was sold by him to the defender.

"The question arises in this way: The pursuer acquired under a feu-charter certain subjects, of which those he subsequently disponed to the defender form part. In the feu-charter the following clause occurs: 'I having paid the expense in connection with completing the pavement in Holburn Place opposite said ground, my said disponee and his foresaids (*i.e.* his heirs and assignees whomsoever) shall be bound to pay me said amount, and that on the house or houses to be built on said ground being finished, and at latest within three years from the date hereof.' By a later clause in the feu-charter all its conditions, provisions, and declarations are declared to be real burdens affecting the piece of ground, and are appointed to be engrossed or validly referred to in all future conveyances of the premises. The date of the feu-charter is 28th December 1875.

"By a disposition dated 30th April 1877 the pursuer sold to the defender a piece of ground and a house which had been erected upon part of the subjects

conveyed by the feu-charter. At that time the pursuer's proportion of the expense of the pavement had not been paid by him to his superior, but some time afterwards the superior claimed payment from the pursuer and got it. In the present action the pursuer seeks to recover it from his disponee the defender. I am of opinion that his claim is not well founded, although I am bound to confess that the point is attended with considerable difficulty.

"The pursuer's contention is founded mainly upon the clause in the feu-charter as to real burdens, to which I have just adverted, and on the clause in the disposition which bears in the usual form that it is granted always with and under these reservations, real burdens, conditions, provisions, limitations, declarations, obligations, and stipulations specified in the feu-charter. By the 10th section of the Titles to Land Act, 1868, such a reference to real burdens is, I need scarcely say, equivalent to the insertion of them in full.

"I understood the pursuer in argument to maintain that the position of the defender is this, that he accepted from the pursuer a disposition containing the clause about payment of pavement which I have just cited from the feu-charter, and that that clause forms part of the contract between the defender and the pursuer, just as much as it formed part of the contract between the superior and the pursuer.

"The law in regard to the effect of real burdens upon singular successors is to be found very fully explained in what is known as 'Coutt's Case,' which referred to Bon-Accord Square in this town. It was found there by the House of Lords that in the charter of a house situated in a square in a town, which charter was granted after walls and railing had been put up to enclose the garden of the square, an obligation, even though imposed in terms on the subjects to pay generally a proportion of the expense of erection of the walls and railing (already put up), will not be binding on a singular successor. But if, on the other hand, the enclosing has not taken place, an obligation imposed on the subjects, not merely on the proprietor, to enclose and pay proportionally, will affect the subjects and singular successors therein; as will also in either of these cases an obligation so imposed to keep the square and enclosing walls and railing in repair, or the like, in time to come. (See Bell's Lectures on Conveyancing, p. 607.)

"The present case seems to me to fall within the former of these two statements of legal doctrine.

"The pavement had been made before the defender acquired the subjects. He was entitled to suppose that the subjects had been cleared of all burdens except such as might be imposed upon them in respect of future operations, and I cannot think that he was bound to assume, even with the clause 'always with and under,' etc., above quoted, and the reference to the feu-charter, that the structure and its pertinents which he saw and purchased were to any extent whatever unpaid for. There must therefore be absolvitor."

Act.—Prosser.——*Alt.*—Meffet.

CATTO *v.* MANSON.

Bankruptcy—Illegal preference of creditor.—The interlocutor explains the circumstances of the case :—

"The creditors of Mr. J. Mathieson were attempting to arrange that their debtor should get a discharge upon their receiving a composition. Apparently all the creditors were willing to accept the composition offered, with the exception of Mr. Catto, the pursuer.

"With the view, I suppose, of overcoming Mr. Catto's objections, and so getting the settlement carried out, Mr. Manson, the defender, proposed to him that if he would go in with the rest of the creditors in taking the composition, he, Manson, would undertake to see that his claim was paid in full. The rest of the creditors, immediately upon hearing of this arrangement, resolved that they would not go on with the proposed composition settlement unless Mr. Catto accepted it purely and simply, and on the same terms as those to which the

other creditors had agreed, and they took the opportunity of expressing their opinion of Mr. Catto's conduct in attempting to obtain what they considered an improper preference in somewhat distinct terms.

"Mr. Catto now, besides declining to accede to the composition settlement, sues Manson upon his alleged undertaking to pay him Mathieson's debt in full. The point thus raised is attended with difficulty, but I have come to be of opinion that there is a sufficiently strong equity to debar the pursuer from succeeding in his claim.

"The pursuer is stated to have been one of the smallest creditors, there being, it is said, other claims of ten times the amount. To attempt to buy off the pursuer's opposition to a settlement acquiesced in by all the other creditors in the hope of thereby saving the expense of a trust, or of a sequestration, was not in my opinion an immoral or an illegal thing. Such a transaction is not struck at by the 150th section of the 'Bankruptcy Statute,' and at such a stage in the liquidation of an insolvent estate there is no law against a creditor going into the market and buying up small claims. That is virtually what this defender did.

"But it is important to notice, first, the precise terms of the obligation granted to the pursuer; and second, what followed upon it. On 17th October the defender wrote to the pursuer, 'I shall be willing to become security that you receive payment of the amount of W. J. Mathieson's account in full. Please advise Mr. Duncan' (the agent of the general body of creditors) 'to-night that you have accepted Mr. M.'s offer along with the other creditors so as to save them meeting.' Accordingly Mr. Catto, of the same date, wrote to Mr. Duncan, 'I have seen Mr. Mathieson, Gallowgate, to-day, and will now go along with the other creditors.' On the following day a meeting of creditors was held, at which the defender mentioned 'that he had conditionally become security to Mr. Catto.' The creditors at once declined to recognise such an arrangement; and finally, on 25th October, resolved that no course was open to them but to take a trust-deed, while they at the same time 'animadverted on Mr. Catto's conduct,' and sent him a copy of their minute. On the 22nd of October the defender intimated to the pursuer 'that owing to changes in the position of W. J. Mathieson's affairs, the arrangement indicated in my letter' (the letter now sued on) 'falls through and the letter void, which please note.'

"In these circumstances the pursuer now attempts to hold Manson liable for the amount of Mathieson's debt. It is a claim upon which the law certainly looks with great disfavour, and which will not be supported unless either the words of the letter of guarantee are distinctly binding words, or unless facts and circumstances shall have followed upon them which confer upon doubtful phraseology an unmistakable meaning. I am of opinion that the letter itself, in the expression 'I shall be willing to become security,' may be fairly construed as implying a condition that the other creditors should not repudiate the arrangement. The sole object of the letter, as was perfectly well known to the pursuer, was, as I have noticed above, to secure an immediate and inexpensive winding up of the insolvent estate. If that object was not gained by it, then the consideration for which the letter was granted entirely failed, and where there is a failure of consideration the obligation fails too. In taking this view, however, I desire to guard myself by saying that if anything had followed upon the letter which had prejudiced Mr. Catto's claim upon the insolvent estate, or if he had been, in reliance upon it, lulled into a security which led him to desist from taking any active measures to enforce his claim, I should have been probably driven to hold that the defender was bound for the debt. But nothing of the kind happened. The pursuer got immediate notice that as the creditors would not in the circumstances hold him as going along with them, the proposed settlement must fall through, and his position with reference to the insolvent and his chance of recovering his debt from him were in no way worsened by the granting or recalling of the letter of guarantee.

"Decree absolvitor."

Act.—Prosser.——*Alt.*—C. Duncan.

SHERIFF COURT OF PERTH.

Sheriff-Substitute BARCLAY.

HENDERSON'S CESSIO.

A cessio was opposed on the grounds, 1st, of reckless speculation; and 2nd, embezzlement of funds or preference to relatives. After a proof the following interlocutor was pronounced:—

"*Perth, 30th April* 1879.—Having heard parties' procurators, and made avizandum with the proceedings, proof, and debate, for the reasons set forth in the annexed note, refuses *in hoc statu* the benefit of cessio to the petitioner, and decerns. HUGH BARCLAY.

"*Note.*—A debtor seeking the benefit of cessio must state and show that his insolvency arose from innocent misfortunes. It sometimes is difficult for a debtor precisely to establish this, but he must at least give *satisfactory explanations* of his inability to pay his debts. It rests with the opposing creditors to prove any other positive objections to deprive him of the benefit.

"In the present case the petitioner's state shows debts to the extent of £339, and assets, even on his own calculations, only to the extent of £74, thus making a deficiency of £265. It rests with him at least to explain this great loss. He endeavours to account for it by losses on some experiment on a tobacco-pipe-top machine and a system of 'coupons' for cutlery, both of which appear to have been the reverse of profitable. Both speculations seem to have been extremely foolish, and the second somewhat worse. This plan approached the character of 'enterprize sales,' and is inconsistent with honest dealing, and detrimental to the fair trader. It is pretended that any person cutting an advertisement, or coupon as it is called, out of a newspaper, and sending it to the advertiser with a trifle of postage stamps, would receive in return an article of much greater value than the investment. It is clear that if this was the fact the traffic would be ruinous, especially considering when, as the petitioner here states, the great sums paid to the newspapers for the insertion of these coupons, which are neither more nor less than advertisements. The system commenced with the fine arts, when celebrated engravings worth one guinea were gifted for eighteen pence to the fortunate possessor of a coupon cut out from a newspaper, and who, in return, received wretched impressions from worn-out steel plates not worth the postage. It was frequently a subject of wonderment how the proprietors of respectable newspapers lent themselves to countenance such dealings.

"These and several other minor matters adverse to the petitioner might, however, have been got over as mere follies. The formidable obstacle which, with every inclination to take a lenient view of his dealings, the Sheriff-Substitute cannot with any regard to justice and authority surmount, is the following: The petitioner, on transferring his business of tobacconist, received £395 in October last. The whole sum he paid away to select creditors, the largest sum being £110 to his mother, said to be in repayment of a loan of which there is no voucher or evidence save his and his mother's oath. Thus no less than thirty-nine creditors whose united claims amount to £339 are left out in the cold, with the dismal prospect of receiving a small dividend, or perhaps without any payment at all. It was clearly the duty of the petitioner, before paying away the whole fund he received from the sale of his stock-in-trade, to have convened his creditors and placed before them a state of his affairs, and compounded with them for an equitable composition, or granted a trust-deed whereby an equal distribution might be made amongst his creditors, many of whom had contributed to the stock thus disposed. It was against all principles of fair and honest dealing for the debtor to take the matter into his own hands and distribute his whole stock-in-trade amongst a few favoured creditors, and leave the remainder unrecognised.

"It will be remarked that the petitioner is designed in the cessio as

'*auctioneer*,' whilst the bulk of his debts and his creditors were contracted in his previous business of '*tobacconist*.' H. B."

An appeal was entered and afterwards withdrawn, and the petitioner was incarcerated.

Act.—Stewart.——*Alt.*—Dow.

Notes of English, American, and Colonial Cases.

STOPPAGE IN TRANSITU.—*Part delivery of cargo—Constructive delivery of whole cargo—Bankruptcy of consignee—Fraudulent preference.*—On the 30th of July a cargo of 114 tons of iron castings was shipped and consigned to M., a merchant carrying on business by himself in London, by a Scottish firm at Alloa, in which M. was a partner. The bill of lading was made out to M. and his assignees, he or they paying the freight. The ship arrived in London on the 7th of August, and M.'s manager in London began to unload the cargo, and thirty tons were on the same day discharged into M.'s barges. M. made certain payments in respect of the freight, which more than covered the amount due for the thirty tons. On the 8th of August M., who was then at Alloa, finding himself practically insolvent, telegraphed to his manager directing him not to commence unloading, or if he had, to stop. The manager accordingly stopped, and on the 12th of August M. came to London, and arranged with the captain to stop any further delivery of the cargo. On the 19th of August M. filed a liquidation petition, and a trustee was appointed. On the 21st of September a sequestration was issued against the Scottish firm. —*In re M'Laren; ex parte Cooper* (App.), 48 L. J. Rep. Bankr. 49.

The English trustee and the Scottish sequestrator both claimed the undischarged balance of the cargo :—*Held* (affirming the decision of the Registrar), that at the time when M. directed the delivery to be stopped, the goods were in the hands of the shipowner as carrier, and that the *transitus* was not at an end; that accordingly the vendors could exercise their right of stoppage *in transitu;* and that the delivery of the thirty tons was not such a constructive delivery of the whole cargo as to prevent the exercise of that right, or to make the act of M. in refusing to accept delivery a fraudulent preference of the Scottish firm. That the fact that M. was also a partner in the Scottish firm made no difference.—*Ibid.*

Per Brett, L.J.—Part delivery of a cargo or of the bulk of the goods is not *prima facie* delivery of the whole.—*Ibid.*

Per Curiam.—When goods are placed in the possession of a carrier to be carried and delivered, the *transitus* is not at an end so long as the carrier continues to hold the goods as carrier, and is not at an end until the carrier by agreement between himself and the consignee agrees to hold the goods for the consignee not as carrier, but as his agent; and the same principle will apply to a warehouseman or wharfinger.—*Ibid.*

HIGHWAY.—*Turnpike—Disused tollhouse—" Not required for purposes of the road"—Encroachment on road by dwelling-house.*—Where a tollhouse had ceased to be used as such since 1867, but was used as a dwelling-house for one of the men employed in the repair of the road, and the trustees had no intention of reimposing the toll at that point,—*Held*, that the tollhouse had become "useless and was no longer required for the purposes of the road" within the meaning of section 57 of 4 Geo. IV. c. 95 ; that the turnpike trustees were not entitled to maintain it as a dwelling-house, it being an encroachment on the road within section 118 of 3 Geo. IV. c. 126 ; and that the adjoining landowner, as being a person using the road, had a right to call upon the trustees by mandamus to pull down and remove the materials of the tollhouse.—*The Queen* v. *The Greenlaw Turnpike Trustees*, 48 L. J. Rep. Q.B. 409.

THE

JOURNAL OF JURISPRUDENCE.

NEWSPAPER LAW REPORTING.

We have previously had occasion to direct the attention of our readers to the ever-increasing scandal of the way in which newspaper reporting is gone about in the Court of Session. An article appeared on the subject in this Journal in 1876 (vol. xx. p. 86), in which the matter was clearly and forcibly discussed. It was not perhaps to be expected that an article in a purely professional periodical would have much influence on that portion of the press against whom it was more specially pointed; possibly nothing that can be further said by us will have the slightest effect in inducing newspapers which depend for their sale on highly spiced intelligence and early information to refrain from outraging public decency and lacerating the most tender feelings in individual hearts; still we do not consider that we would be doing our duty to the profession for which we have the honour more especially to write, or to the public in general, if we did not lift our voice in emphatic protest against the scandalous manner in which certain newspapers insert what they with unconscious irony call "Legal Intelligence" in their columns.

At present the reports of legal proceedings which appear in the newspapers are furnished not by any members of the profession, but by ordinary reporters, who hang about the Courts during the day picking up anything they may deem of general interest. Any filthy garbage which they may come across is carefully transferred to their notebooks; they haunt the Outer House bars, and when a court is full of a seething and unsavoury mass of humanity drawn

thither by prurient curiosity as to some divorce case or the like, there you may find them the most attentive auditors. It is almost unnecessary to say that when any nice point of law is discussed in a case, in the majority of instances it will be utterly bungled in the newspaper reports. The most serious feature in this popular law reporting, however, remains yet to be stated. Whenever a summons is called into Court it is at once got at by a certain section of the press, and the statements contained in the condescendence immediately published. How the papers are got at we cannot tell; it may be that clerks are judiciously manipulated, or possibly that some of the lower class of agents supply such papers from a desire to see their names flourishing in the public prints, or perhaps from less innocent motives. In whatever way such documents are procured, we have no hesitation in saying that in many instances their publication produces evils of which the outside public know nothing, and tends in not a little degree to lower the standard of public morality.

The principal objects of a suit at law are, we take it, to enforce rights or redress wrongs. If, however, the custom, which has gradually of late years been getting more and more common, of publishing *ex parte* statements in a case, increases or is continued in the way in which it is now, a new terror will be added to litigation. Any scoundrel may go to a man of unblemished character and say, "If you don't pay me so much, or do such and such a thing, I will raise an action against you in Court. I know that I cannot hope to succeed in such a suit, but the statements which I shall make on record will be disseminated far and near by the most widely circulated papers in Scotland, and you will be held up to the ridicule and contempt of thousands, without having an opportunity of saying anything for yourself, as before defences are due the action will be withdrawn." In this way an action at law will be the most dreadful threat of vengeance which a man can have hung over him. Statements which would be grossly libellous if made elsewhere, appear in the public prints under the head of "Legal Intelligence." A man's friends may not believe them; but the thousands of readers who are not his friends take what they read for gospel, and probably set him down as a blackguard and scoundrel, when the statements made against him are a tissue of distorted exaggerations, if not actual falsehoods. We sincerely hope that some spirited individual will raise an action of damages against some newspaper for slander. In our opinion he would have a good claim for such damages, and it will at all events be a public benefit if the question is ere long tried.

Besides the mere blackening of the character of an innocent individual, this procedure of the newspapers has the evil of, in many instances, preventing the amicable settlement of cases. A case, for instance, is called in Court, but the parties upon more mature reflection wisely agree that it will be more advisable not to

wash their dirty linen in public, and negotiations for a settlement are commenced, and have every prospect of terminating satisfactorily. In the meantime, however, the harpies of the press, ever on the look-out for something sensational, have got hold of the summons and pursuer's statement, and immediately posters are out all over the town with the announcement in large capitals, "The Puddleton Street Divorce Case—Extraordinary revelations in high life," or words to that effect. The evil is now done, the parties to the case become more and more embittered against each other, the negotiations for a settlement are broken off, and by this scandalous action of the press, misery and wretchedness are brought to a home which might, by the good offices of friends, have been made once more a united and happy one.

But apart from the wrong done to individuals, how, let us inquire, does all this react upon the public? Is anything gained to the cause of morality and decency by the publication of details of private life, with which nobody has anything to do but the parties concerned? We say emphatically No! It is idle to say that they serve as warnings; on the contrary, they merely stimulate a prurient curiosity on the part of the public, and by exposing all sorts of melancholy incidents of private life, tend to lower the standard of morality in the public. We do not doubt that the more sensational the law reports of a newspaper are, the more extended will be its circulation; but is it creditable thus to pander to the lowest tastes of human life? The Press sets itself up nowadays as a great teacher, the question is, Are its teachings to be those conducive to morality and cleanly living, or is it to bring into the bosom of the family details which, if they were contained in a book, every right-minded man would carefully guard from his wife and daughters? We are, however, entering on a part of the subject which is beyond our province; let us conclude this paper by endeavouring to ascertain if anything can be done to stop the evil to which we have been alluding.

We have already said that we hope some one who has suffered will raise an action of damages against a newspaper which has published an *ex parte* statement affecting him injuriously. The opinions of many legal writers seem to point to the conclusion that such a proceeding on the part of a newspaper is utterly unjustifiable. Mr. Borthwick in his work upon *Libel* (p. 209) says, "Whatever may be thought of the privilege to publish the proceedings *after* a cause or trial has been brought to a conclusion, it may be safely said that the same privilege does not extend to the protection of those who publish depositions taken before a magistrate, or statements of the proceedings in public courts, either in criminal trials or in civil suits, *before these are brought to a conclusion.*" And Lord President Hope says, "What has the liberty of the press to do with the miserable lawsuits of individuals? And in particular I desire from this chair to say, whatever may be the practice in England, what

have newspapers to do with lawsuits during their dependence?" (*Stuart and Allan* v. *M'Kay*, 31st Dec. 1818.) Mr. Starkie, the leading English authority upon the law of Libel, says, "It seems that the publication of *ex parte* proceedings, even of a civil nature, when they are injurious to the characters of individuals, cannot be justified. For the communication of such proceedings may frequently be attended with great hardship to the individual, and can seldom, previous to the final decision, be of importance to the public as containing any judicial information." This is a very suggestive observation; of what earthly use is it, may we ask, to publish *ex parte* statements without any relative documents? They are put under the head of "Legal Intelligence:" is there the slightest knowledge of law conveyed to the public by their learning that certain facts are alleged to have occurred with reference to certain persons at a particular time, such alleged facts being just as likely calumnious charges made with a view to extortion? When the case is brought to a termination, and judgment delivered, then, if there is anything of general interest in the case, the publication of the proceedings would not be so objectionable, though probably, as we said before, any intricate point of law involved would be hopelessly lost sight of by the newspaper reporter. At present, however, the course which the newspapers are taking is immoral, unjust, and illegal.

But it may be asked, Can the Court of Session itself not do anything to put a stop to this scandalous practice? We think that in some measure at least it may exercise a wholesome influence as regards the publication of inchoate legal proceedings. In our opinion—and in this we are supported by high legal authority—no one has any right to see the papers in any case save the parties to the case themselves (which includes of course their representatives), the Judge who is to revise and close the record, and the various officials of Court to whom the papers are boxed. Now, honest agents—and this includes, we are sure, almost all the solicitors practising in the Court of Session—honest agents, we say, can surely prevent the publication of any documents connected with a case in their offices, by simply prohibiting their clerks on pain of dismissal from supplying any information regarding a case directly or indirectly to the newspapers. But if the latter do not get their information from the offices of the agents in the case, but go to a more direct source, and receive a sight of the documents from the Clerks of Court at the Register House, then the Court of Session must interfere and prohibit their servants from giving such information. In whatever way it is gone about, it will be necessary to do something to stop a custom which threatens in many cases to defeat the ends of Justice, to blacken the character of many an innocent person, and to make litigation a powerful weapon in the hands of an unscrupulous enemy or pettifogging agent for the purposes of oppression or extortion.

MINERAL RENT.

THE liability of mineral rent to assessment may be taken as further illustrating the various points of view from which this subject may be regarded. Its liability to the poor-rates was determined in the Inveresk case at the comparatively recent date of 28th May 1794 (M. 10585). It was there urged by the mineral owner that there was at that date no instance in Scotland where collieries had been assessed; that the only subjects liable under the Act 1663, c. 16 (an Act concerning beggars and vagabonds), were those entered in the old extent or valuation and therefore liable to cess; and that if it had been intended to include coal under the Act, so peculiar a subject would have been mentioned, as it was in the English Act, 43 Eliz. c. 2. The parochial collector, on the other hand, contended that there was no ground for distinguishing between a heritor whose revenue arises from the fruits of the surface and another who derives his income from mines under it; that the words of the Act were wide enough to comprehend mines as being part of lands; and that the Act further gave a large discretion to the heritors of the parish with regard not merely to the mode, but to the subjects, of assessment. It was apparently this last consideration, not a very satisfactory interpretation of the Act,[1] which chiefly weighed with the Court in deciding that the coalworks were liable. The case was remitted for further hearing on the mode or rate of assessment, but what passed does not appear from the report.[2] There is, indeed, nothing very distinct on that subject until we come to the important case of *Mackintosh* v. *Playfair's Trustees* (28th May 1841, 3 D. 893). In that case it appeared to have been the practice in the Barony parish for a considerable period to charge poor-rates on collieries in accordance with an agreed-on rate per cart of the whole output in each year. This agreement having been departed from, and it being resolved to take the real rent of the parish generally for the purpose of ascertaining the means and substance of both heritors and tenants, it was found after great consideration that the rule for assessment as regards both proprietor and tenant was the actual rent or lordship paid by the tenant to the proprietor. Those resisting the claim for rates rested on the decisions relating

[1] The words of the Act are: "To be paid by the heritors either conform to the old extent of the lands within the parish, or conform to the valuation by which they last paid assessment, or otherwise as the major part of the heritors shall agree, and the other half to be laid on tenants and possessors according to their means and substance."

[2] It appears, however, from the papers in Mackintosh's case, subsequently mentioned, that under this remit it was found by Lord Craig that "every working or open pit" must be presumed to yield a profit or rent of £50, and must therefore be assessed at the rate of 4d. per £1 of rent. There had been at the beginning of the Inveresk case an inquiry as to practice ordered by Sheriff Cockburn, the result of which was apparently to show that the rating of mines was scarcely known in Scotland.

to terce, disputed the authority of Waddell's case (*supra*, p. 341), and contended that the annual payment was really a combination of *rent* and *price*, and that allowance must therefore be made for the exhaustion of the subject. The collector, on the other hand, quoted Stair (ii. 3, 73) to the effect that liferenters were under certain qualifications entitled to the annual profits of coal mines, and argued that, as the burden would vary with the rent or lordship and cease when they ceased, it was not necessary to make allowance for exhaustion, or indeed for anything (where rent or lordship could not be taken as conclusive) except expense of working, and a deduction for tenant's profits, and also for repairs and depreciation of machinery. Before taking the opinion of the whole Court, a remit was made to two mining engineers, who reported that, looking to the nature of the subject and the expense of working, the assessment as regards the tenants should be charged on 40 per cent. of the clear rent. The facts were that the minerals had been let in the year 1824 for thirty years at a fixed minimum rent of £780, or, in the landlord's option, a lordship of two-thirteenths of the selling price. The landlord had taken a very large lordship for many years. The tenant had expended £15,000 on machinery and other necessary plant. There was no symptom of the coal being exhausted. The question of liability arising in the circumstances seems to have been treated by the Court as one of difficulty, for the opinions of all the Judges were taken. It is stated in the defender's case that the first Lord Meadowbank had expressed the opinion that "an angel from heaven could hardly settle the rate" applicable to coals. The Judges were, however, unanimous, and the principle of the decision was that, as the produce of the coal to the landlord was to be taken as rent and not as price, or instalments of price, such rent must be treated like other rent, because, as Lord Mackenzie said, "the sum actually paid to the landlord was the thing likest rent." It was explained by Lord Moncreiff that the arrangement for taking rent as the basis of assessment must be "without inquiry into the circumstances which may produce that rent, or the burdens or qualifications by which it may be affected." It was "not an attempt to ascertain the actual profit which the landlord or tenant may realize from the property or occupancy of the particular land or subject, and still less to fix the positive value of his interest in that as a real estate. It was only a rough mode adopted for general convenience of making a probable approach to a fair estimate of his proportional means and substance compared with the other heritors and inhabitants of the parish." It was indeed precisely for the purpose of avoiding an inquisitorial search into the amount of "goods and substance" belonging to each heritor and tenant, that with regard to each class the real rent had been so frequently selected by parishes as the rule of assessment. The Court pointed out that if coal-rent were to be treated as price to any extent, it must be so

to the whole extent, and the entire heritable subject would in this way be exempt from assessment even by way of valuation and percentage. They considered that the case of liferenter was stronger than that of a mineral proprietor, and they pointed to the Act 1693, c. 16, which provides that liferenters and wadsetters should be liable *during their rights* just as heritors. The then recently passed Prisons and Police Acts (2 and 3 Vict. cc. 42 and 65) were also referred to, as they make special mention of mines and minerals among other heritages assessable for the purpose of these Acts, either upon the rent received under a lease or on a fair average rent calculated for assessment purposes. As regards the tenant's claim in respect of exhaustion, and for money spent in making the mine productive, it was considered that these matters must have been sufficiently taken into consideration by the tenant when he adjusted his rent with the landlord.

It has already been noticed that in the early Prisons and County Police Acts of the present reign mineral rent was specially provided for. The only case which arose on the Prisons Improvement Acts (2 and 3 Vict. c. 42, and 7 and 8 Vict. c. 34) was apparently *Addie* v. *Gillies* (March 2, 1848, 10 D. 836). The difficulty occurred that an elaborate definition was given of assessable property in counties, while with regard to burghs the first Act merely spoke of "property," and the second Act declared that "property" should include many things, such as houses, shops, railways and canals, and the "pertinents" of land, but without making any express reference to minerals of any kind. The Court held that an ironstone pit in the burgh of Airdrie was assessable. This result was no doubt reached on the ordinary principles of construction applicable to taxing statutes, but the Court recognise in their judgment that the annual proceeds of mines form part of the annual value of land and its pertinents.

Before proceeding to the provisions of the Valuation Act of 1854 on this subject, it must be explained that the liability of such rent to annual public burdens, such as poor-rates, was held to be quite consistent with its exemption from such parochial burdens as the Court consider to be *permanent* in their character. This was decided in reference to the expense of building a new church in the second Inveresk case (*Bell* v. *Earl of Wemyss*, Feb. 16, 1805, F. C.). Real rent having been taken as the basis of assessment, the collector there argued that coal mines were real estate, susceptible of separate infeftment; that collieries added to the population of the parish, and thus increased the amount of the rate; and he offered to make a proportional deduction in respect of the precarious nature of the rent. The argument of the heritors was that minerals could not have entered the cess-roll, as they were not in use at the date of the original valuation, and therefore could not now be valued for real rent; that they were excluded by Act of Parliament; and that it was inequitable to put this burden on a precarious income. [The

ing at the fixed rent, the tenant having no right to abatement. The Commissioners decided in favour of the amount of lordship actually and *bona fide* paid in the last year, but the Court held that the fixed rent must be taken. In the case of Liddesdale, better known as the Kirkmabreck case (No. 27), the Liverpool Dock Trustees (continuing an arrangement of very ancient date between Galloway and Liverpool) were tenants of a quarry in the glebe of Kirkmabreck. They paid a lordship of 1d. to 3d. per ton, according to the quality and size of the granite blocks. Of the annual sums so received 90 per cent. was paid into an accumulating fund, of which the incumbent received the yearly interest along with the remaining 10 per cent. as compensation for loss of amenity. The glebe was entered at the whole sum annually received. The minister and heritors appealed, contending that if the glebe, which was intended for the permanent support of the living, was converted from granite into money, only the percentage actually paid to the minister should be allowed as the valuation. The Assessor replied that the Valuation Act did not authorize any inquiry to be made with regard to the destination of the proceeds or rent of any subject liable to be valued. The lordship entered, whether regarded as actual or merely estimated rent, was rather below the average. Both the Commissioners and the Court held that the Assessor was right. Before disposing of the case the Judges ordered an inquiry to be made as to the principle followed by assessors in valuing mines and quarries where the payment by the tenant was by lordship. The inquiry was made in eleven counties, including the more important mineral districts and quarries in Scotland, and the result was to show that as matter of practice the value taken was either the amount of lordship actually paid in the year preceding the year of valuation, or else an average of the lordships paid during a variable number of preceding years. It was specially reported that no difference was made in the case of a mine which happened to be in a glebe (*e.g.* in the case of Shotts). In the case of Campbell (No. 33) an attempt was made to upset, with reference to mineral subjects, the principle which had been settled in Lord Lovat's case (No. 39) for agricultural subjects, viz. that the rent, and not the subrent, is to be taken as the value of the subjects on which the proprietor is assessable. The only distinctions were, that in Lord Lovat's case there was no formal subset, but the subjects had been increased in value by erections made by the tenant. The view of the Commissioners, upheld by the Court, was that in justice the difference of rent between lease and sublease should be laid on the tenant, not on the proprietor; but as the statute contained no provision on this subject where leases were of ordinary duration, such surplus rents actually paid were lost

simply to compel a certain extent of working." But, of course, a practice of remitting the excess of fixed rent over lordship would defeat this object.

for purposes of assessment. In the case of the Carron Company (No. 40) certain coalworks were let to the Carron Company for periods of upwards of thirty-one years, and the Commissioners fixed the value of the coalworks at 6d. per ton upon the output. The Assessor proposed to value separately the machinery, pithead buildings, and railways connected with the pits, although the 42nd section of the Valuation Act declares that the expression "lands and heritages" is to include buildings and pertinents and machinery. It was stated by the Commissioners that they had fixed the lordship with a view to cover the value of the machinery and appurtenances necessary to make the mine a source of profit. The Scottish practice was entirely against any separate valuation of such subsidiary subjects. It was also stated that it was disputed whether the machinery in question was heritable or not. The Court sustained the view of the lessees, which had previously been adopted by the Commissioners. In the case of the Drumgray Coal Company (No. 55) this principle was held to be inapplicable to the retorts, fittings, condensing-pipes and tanks used in connection with a shalework. The tenants there contended that these fittings were of absolutely no use apart from the work, and must therefore be included in the valuation of the work; that separately from the work they were not so fixed as to be heritable in character; and that the rule of 15 per cent. on original cost, stated by the Assessor, was unfounded and unfair. The Court, however, adopted the view of the Assessor. It was taken by them as a fact that no complete part of the structure could be removed without injury, or without destroying what was left; and also that the ground on which the fittings were erected was not included in the lease of ground on which the colliery was erected; and that 15 per cent. on original cost was a fair and reasonable return to be expected from the subject. In the case of Summerlee Iron Company (No. 114) an ingenious attempt was made by the Assessor to evade the principle of the Carron Company's case. He urged that tenants who held minerals under a thirty years' lease, and who had sunk the usual pit and erected the necessary engines at the pit mouth, were to be regarded, and properly entered, as *proprietors* of these buildings and machinery, although they were only tenants of the minerals. The Court had no difficulty in repelling this contention.

With respect to the liability of mineral rent to imperial taxation an unfortunate difference of opinion appears to have arisen between the Scottish and English Courts, which must tend still further to increase that inequality of contribution to the imperial revenue of which our patriotic representatives so frequently complain. In *Knowles* v. *M'Adam* (Dec. 5, 1877, L. R. 3 Exch. Div. 23), a colliery company, being assessed under Schedule D of the income tax in respect of the profits made on their leasehold coal mines, claimed as a deduction for exhausted capital the sum of £10,626, being the difference of the value of the mines at the beginning and the end

of the year for which the profits were claimed. This sum was also called "depreciation," and was said to be based on a calculation of the extent of coal available and the duration of existing leases, but it might be modified as future circumstances require. The phrase used in the first rule of Schedule D is "the full amount of the balance of the profits or gains of such trade, manufacture, or concern upon a fair and just average of three years." The third rule provides that the following shall not be charged on profits for the purposes of the Act: (1) Repairs of trade premises and repair or alteration of trade utensils, except the average of three years; (2) loss not connected with trade; (3) capital withdrawn; (4) sums employed as capital in trade or improvement of premises; (5) interest which might have been made on such sums if laid out as capital, etc. The Commissioners declined to allow the deduction claimed, but they stated a case for the Exchequer Court. It was argued by the proprietors of the colliery that they were entitled to the deduction on the politico-economical definition of profits, and on the legal principle laid down by Lord Cairns in *Gowans* v. *Christie* (L. R. 2 H. L. Sc. 284), that a mineral lease is "really, when properly considered, a sale out and out of a portion of land." The Surveyor of Taxes argued that the deduction was money set aside for depreciation of capital, and that the Income Tax Act disregarded the principles of political economy. The Court (Kelly, C. B., and Cleasby and Pollock, BB.) seem to have had no difficulty in deciding that the deduction must be allowed, Baron Cleasby stating that in doing so he did not decide the case of an owner of land opening a quarry or mine, and either working it himself or letting it upon a royalty. The leases had an average of thirty-two years to run. A price of £717,421 had been paid subject to an average royalty rent of 7d. per ton. This case seems to conflict in principle with the Scottish case of *Miller* v. *Farie* (Nov. 29, 1878, 6 Rettie, 270), where it was distinctly held that under Schedule D of the Income Tax Act, in estimating the full amount of the balance of the profits and gains of a colliery which was worked by the proprietor, no allowance was to be made for depreciation of capital by the mine being worked out. The extent or rate of diminution was said in that case to amount to 5½d. per cart of 13cwt., with an average annual output of 60,000 carts. The deduction for depreciation actually granted by the Commissioners was greater than the net returns from the colliery. It was successfully argued by the Surveyor that this deduction was contrary to the intention of the Income Tax Act, which taxed income from whatever source derived. If the owner had let the minerals, he would have paid income tax on the rent. The case of Knowles was said to be different because the lessees there had purchased the minerals. In delivering the opinion of the Court the Lord President said: "An assessment upon profits of trade is an assessment upon the most precarious of all incomes, and an assessment upon professional income would be liable to a much more

serious objection than an assessment upon the lordships derived from a mine, because a professional income is one that has no capital to represent it at all; and if one proceeded on equitable views in regulating the assessment for the income tax, I am afraid we should find one class of incomes after another slipping through the fingers of the Surveyor till there was nothing left to assess." It may be taken that there is a conflict between these two cases on the interpretation of the Income Tax Act.[1] The reasoning of the English Judges seems to apply with equal force to the case of the proprietor. The doctrine of depreciation arising from exhaustion was not recognised for the first time in England in the case of Knowles. It was made the subject of express decision in *Rishton* v. *Grissell* (L. R. 5 Eq. 326), which was a question between the owner of leasehold premises and minerals and his manager, whom he had promised to pay in part by a percentage on the profits made on the business. There Vice-Chancellor Wood held that the employer was entitled to charge the profit and loss account in every year with sums representing the depreciation arising from the running out of the lease and the waste of plant and machinery.

The history of the assessment of minerals in England is very singular; the great Poor Law Act of Elizabeth (43 Eliz. c. 2) expressly authorized the taxation for poor law purposes of *coal mines.* The result was, that although the Judges permitted *quarries* to be rated as falling under the general term *lands* used in the Act, they felt themselves bound to exclude every kind of *mine* proper which was not a *coal mine.* This they did at first because they thought no certain profit was to be got from a mine, but latterly on the principle *expressio unius exclusio alterius.* This was the law till 1874, when the Valuation Act (37 and 38 Vict. c. 54) was passed, which extends the Poor-Rate Acts to mines of every kind not mentioned in the Act of Elizabeth. Where tin, lead, or copper mines are let without fine on a reservation, wholly or partly, of dues or rent, the gross yearly value under this Act is to be taken as the amount of dues paid in the year before valuation *plus* the fixed rent so far as not satisfied by such dues. The gross value is to be taken as the rateable value, except where the person receiving the dues or rent is liable for repairs, insurance, or other expenses necessary to maintain the mine in a state to command the annual amount of dues or rent, then these expenses are to be deducted from the gross value. But where a fine has been paid on the lease of the mine, or where the mine is worked by the owner, and in all other tin, lead, or copper mines to which the foregoing general principle does not apply, the rateable value is taken as the annual amount of dues or dues and rent at which they might reasonably be expected to let without fine on a lease of ordinary duration, according to the usage of the country, if the tenant undertook to pay all tenant's rates and taxes and tithe rent-charge, and also the repairs, insurance,

[1] The point has been recently argued before the House of Lords in the appeal of the Coltness Iron Company.

and other expenses necessary for the maintenance of the mine in a normal condition. Where such a mine is under lease, the term "mine" is declared to include the underground workings, engines, machinery, workshops, tramways and other plant, buildings which are not dwelling-houses, and works and surface of land occupied in connection with and for the purposes of the mine, and situated within the boundaries of the land under lease. The Act also finds it necessary to provide that where a mineral lessee becomes liable for a local rate from which the mine had previously been exempt, and this occurs before the period for readjusting the rent, the lessee may deduct from his rent at least one-half of the whole rate calculated on his rent, unless he has specifically contracted not to do so. (See the Duke of Devonshire's case, L. R. 2 Q. B. Div. 286.) All the subjects brought in for poor-rates by the Act of 1874 become at the same time subject to all other local rates: a wholesome provision, in marked contrast to that contained in sec. 41 of the Scotch Valuation Act, which saves all existing exemptions of property from assessment, however antiquated and unreasonable these may be. The English Act, however, errs in the same direction in sec. 13, which continues the exemption as regards lessees which the Judges had previously conferred on mines the dues of which were wholly reserved in kind. The historical explanation of this exemption has been given by Mr. Castle in his recently published book on "The Law of Rating" (Stevens & Son, 1879, pp. 339-50). The English Judges were influenced by the principles applicable to the payment of fifteenths and subsidies to the Crown, and they held that although the Poor Law Act exempted mines, not being coal mines, and the tenants found in possession of them, yet as, in legal theory (contradicting in this respect the terms of the statute), all property is rateable to the poor, the rent of the landlord is rateable, where the tenant is exempt, because, according to Lord Mansfield in *Rowls* v. *Gells* (Cowper, 451), "it is not a mere casual profit, but an annual revenue if any." This reasoning may probably have been aided by the consideration, that while tenants were exposed to very great risks in the undeveloped state of mining at that period (as indeed they are still at High Blantyre and elsewhere), the landlord who had entered into a lease had a certain security for his rent. On this principle of permanent profit, one would have expected this result to follow especially in the case where there was a fixed money payment not determined by the output. But it was precisely where rent was paid in kind, where, in the language of the English law, "there was a reservation of any part of the thing demised," that the Judges held the liability of the owner to emerge. Indeed, so far was this distinction carried, that although all ore must be more or less produced by human labour, yet where the rent was received in *smelted lead*, the owner was held to be not liable. The preservation of this distinction in the Rating Act, 1874, is said to be for the purpose of preventing injustice to tenants under existing leases,

but the remedy for that would have been to save rights under existing leases, or at least under leases of a certain duration. It is truly said by Lord Blackburn in *Roads* v. *Trumpington* (L. R. 6 Q. B. 56), that "the doctrine that the produce of mines can be rated, although mines cannot, is very peculiar, and rests on authority alone." That the peculiar doctrine, however, still flourishes may be seen in *The Van Mining Co.* v. *Overseers of Llanidloes* (L. R. 1 Exch. Div. 310).

The only remaining decisions in Scottish law to which we desire to refer at present are *Houldsworth* v. *Brand's Trustees* (Jan. 8, 1876, 3 Rettie, 304), and *Weir's Executors* v. *Durham* (March 17, 1870, 8 Macph. 725). In the first of these a doubt is suggested by Lord Moncreiff how far the ordinary rules with regard to violent profits, or at least with regard to damages due for wrongful retention of possession by a tenant under an agricultural lease, will apply "to a lease of a subject which yields no periodical produce, which has no reproductive power, and under which the tenant appropriates not the increment or fruits of the property, but the property itself." It had been argued by the landlord in that case that a stricter rule of accounting for fruits and profits should be applied where the granter might lose not merely the usufruct, but the subject itself. The subject, however, does not seem to have been further pursued. In the case of Weir's Executors, where mineral fixed rent was payable at Whitsunday, but subject to an optional claim of lordship calculable and exigible at Martinmas for the minerals put out during the preceding year, it was held that the landlord having died on 31st May, his executors were entitled to one-half of the Martinmas lordship, after deducting the rent received at Whitsunday, just as if one-half of the rent had been payable at Whitsunday and the other at Martinmas. The executors asked the Court to apply the rule which vests the right to house-rent in the proprietor who survives the term of entry to possession. Lord Deas, however, who delivered the leading judgment, preferred to adopt and apply to minerals the principle which governs the apportionment of the rents of arable land, viz. that payment has been postponed merely for the convenience of the tenant, and to enable him to realize his rent out of the crop for the year. He said: "The case is very much the same in respect to minerals. Until they are sold the tenant has not the proceeds out of which to pay the rent. Every one knows that minerals are not sold day by day all the year over. There are times when the demand is greater and the market more favourable than at other times. There are times when it would be ruinous to force sales, and times when it would be unprofitable to work extensively. . . . An additional reason for postponement is that till the year is closed the landlord has not the means of knowing whether it is his interest to exercise his option of a lordship or not. . . . The only alternative would be to hold that it" (viz. the mineral rent) "vested *de die in diem*. . . .

But it would not be equitable so to deal with such a case as this, because the rent could not accrue in 365 equal parts, as the minerals may produce largely in one portion of the year and not in the other." Lord Kinloch took the same view, observing: "In drawing these lordships the landlord is acting neither as partner with the lessees, and as such drawing a part of the produce, nor as in any other character drawing a commission on the sales. He is exclusively a landlord drawing rent. . . . The sum is from its nature fluctuating, but it is fluctuating only in amount. Its legal character is rent." This decision appears to involve that Whitsunday and Martinmas are legal terms for mineral as well as for agricultural rents.

There are thus at least four views taken in the law of Scotland of the legal character of mineral rent. First, it is the price of *pars soli*, and not rent or annual value at all; second, the actual rent or lordship paid under a lease of ordinary duration is the annual value of minerals; third, the average of several years' rent or lordship is the annual value of minerals; fourth, the interest (at a rate not precisely fixed) on the capital value of the mineral leasehold is the annual value of the minerals. The first view appears still to rule practice with reference to certain parochial assessments for objects of a permanent nature. Where minerals have not been let by the proprietor, it also seems to rule the cases of some liferents both legal and conventional. The second view receives effect in the case of the great majority of public and parochial burdens (the case of the income tax being doubtful) by virtue of the provision of the Valuation Act of 1854, and also in the case of apportionment between heir and executor and of liferents where the lands have been let. As regards the last-mentioned class of cases there is no doubt some conflict of authority, but we refer to Lord Shand's opinion in the case of *Fergusson* (4 Rettie, 542) as perhaps the latest statement of the law on this subject: "The Court with reference to mineral rents have come to the general conclusion that if minerals have been let by the owner of lands, at least if they have been let for a considerable period of time, the lands are brought into the category (as Lord Neaves puts it in the case of *Wardlaw*) of a subject bearing fruits, so that these cases really settle nothing more than this, that mineral rents in that position are to be regarded as fruits of the lands; and if a liferentrix have a liferent, she shall receive these rents, which are parts of the fruits." It may also be noted that from a note in "Hunter on Landlord and Tenant" (i. 128) the learned editor of that work would seem to be of opinion that the case of *Guild* (before referred to) upsets the rule that liferenters have no right to minerals. Free rent under the Entail Acts or deeds of entail seems generally to mean the full rent actually received where it is a fixed rent under a lease. It would further appear that in the case of liferents, and also of an heir of entail in possession, the approaching exhaustion of minerals might influence

the decision of this question. The third view is most popular in the consideration of the question, what is the free rent of an entailed estate at the date of the death of the granter of an entail provision; at least, in cases where there is not a fixed rent but a lordship. Various averages are taken according to circumstances, but no stateable principle has guided the discretion of the Court, and it has been hinted, though without general agreement, that the fourth view might be adopted in cases which have not been defined. The fourth view is applied in the settlement of rent for purposes of composition to the superior. It is sometimes, though not invariably, applied in combination with the third view. For instance, in *Sivright* v. *Straiton Estate Company* (9th July 1879), an average of three years was first taken to reach the fair annual rent, and then this was capitalized at ten years' purchase, the superior only getting the interest on the capitalized value. The principle of the liability of mineral rent to such a claim, viz. possession of the feu by the superior, is opposed to the method of valuation. It seems to follow on grounds of close analogy that if only the interest on valuation is payable to the superior, this interest, like that on a grassum paid for a subfeu, ought to be payable to the superior in perpetuity. (See papers in *Sivright* v. *Straiton Estate Company*, 9th July 1879.) Such a perpetuity could hardly, according to recent forms of conveyancing, be made a condition entering the title of a vassal, but, as in the case of grassums, the right of the superior to prove the valuation after the actual exhaustion of minerals might be affirmed. Taking the four views of mineral rent in the cases mentioned, there seems to be scarcely such a difference in the legal relations involved as to warrant the wide difference of the legal results.

In considering the present state of the law on this subject it will of course be remembered that the development of mineral production in Scotland has been comparatively recent. There were of course many social causes for this, but among legal conditions may be mentioned the fact that in 1424 all mines were annexed to the Scottish Crown, which was represented in their management by a Master of the Metals. This was not favourable to competition. Thus in 1583 a general grant or lease of all mines in Scotland was made to a foreigner named Eustache Roche, who seems to have made no use of his privilege. It was only in 1600 that the Crown obtained power to feu minerals, there being at that time a dearth of fuel felt even in the royal palaces. In 1609 a public proposal was made to start an ironwork in the Highlands on the ground that, there not being enough of coal, wood might be got in plenty; and in the following year the concession to the family of Hay of Netherliff of the sole right of iron and glass manufacture within the realm, indicates how small the demand for coal at that time must have been. In the middle of the seventeenth century Commissioners were appointed to regulate the price and sale of coals in the different shires. Nothing, however, shows more clearly the

undeveloped state of the mineral wealth of the country than the "Memoranda of Minerals" which have been reprinted from the Sibbald MSS. by a learned member of the Faculty, Mr. Cochran-Patrick (Records of Early Mining in Scotland, 1879). These Memoranda consist of reports by Colonel Borthwick and others, giving in detail the localities in which various minerals had been found or were believed to exist in 1683. Indeed, the remains of the old pits and haughs, of even a more recent date, in Ayrshire, show that the work of excavation was of a very limited kind. Modern pit-sinking obviously depends on the application of steam-power to the questions of drainage and haulage.

OBSERVATIONS ON THE "REPORT UPON THE VITAL, SOCIAL, AND ECONOMIC STATISTICS OF GLASGOW FOR 1878. By WILLIAM WEST WATSON, F.S.S., City Chamberlain."

WE have been in the habit for many years of noticing these annual reports. They embrace a collection of many varied and interesting facts which cannot fail to receive the notice and demand the serious attention of the statist and legalist.

The Chamberlain of Glasgow, as has been his custom, commences his report with a verdict and judgment on the defunct year. The year 1878 receives this very solemn character: "Another year of gloom and despondency, not only general but prevalent throughout almost every branch of commerce in the land, has passed over us, exceeding in each particular even its predecessor 1877. The disasters of that period, it was fancied, could not have been surpassed; but they have been far eclipsed, and it is now obvious that we are indeed paying in dire results for the wild madness of factory extension and the reckless inflation of business which immediately succeeded and raged for a year or two after the conclusion of the great Continental war in 1871. But much of this depression may also, without doubt, be attributed to the fierce competition of many foreign countries which were formerly our customers, and which now, with the advantage of machinery actually furnished mostly in Britain, and under the shelter of high and unopposed tariffs directed against the importation of our British productions, supply themselves with much of what, at no distant period, was furnished from this country."

The reporter goes on to deplore the conflicts between labour and capital, and records the astounding fact "that notwithstanding the sad scarcity of employment in the country, there were 277

strikes in 1878 against 181 in 1877. In only four of these 277 strikes were the men distinctly successful, and in only seventeen was a compromise entered into. In the remaining cases the men distinctly failed, and after being out of work for various periods, either went back to their work on the masters' terms or never returned at all."

The reporter gives an interesting outline of the extent and result of the failure of the Glasgow Bank. He concludes with the sentiment, "It is a thing almost too dreadful to contemplate what such awful figures in such awful circumstances represent—what ruined homes and broken hearts, and death and desolation and despair!" As an addenda to the great local misfortune it is stated that the total commercial failures *officially* announced during 1878 amounted to 13,869 in England, 852 in Scotland, and 388 in Ireland. "The only redeeming features of this dismal year—and greatly were they needed—were a brilliant summer season, a harvest satisfactory upon the whole, and the very moderate prices of some few of the necessaries of life, including bread, sugar, tea, and coffee, but all superadded to a comparatively gratifying condition of the state of the general public health and mortality." The public sympathy manifested for the sufferers arising from the bank failure receives a meed of praise, but from which London is rather made an exception. The lottery scheme rather seems to have received the approbation of the Chamberlain, and regret is expressed on its failure from legal obstacles.

The reporter proceeds to record the state of weather, temperature, rainfall, and mortality, with the somewhat unexpected result "that the mortality was decidedly under the average of the ten years, notwithstanding the greatly increased population which had arisen during that considerable period." "As usual, diseases of the chest were the chief causes of death, but there was no epidemic. Typhus only numbered four victims, and smallpox only one." The reporter then calls up each successive month, and bestows on it its characteristic. September is stated to have been the wettest month of the year, and yet the mortality was the lowest of all recorded during the year. November introduced "the longest and bitterest winter within the memory of the present generation." December, "bitter and wintery as it was, yet its *average* temperature greatly exceeded that of the last ten years."

An important section is devoted to the natural increase of the population, that is, the numerical difference between the births and the deaths recorded during the year. "The variations between these conditions in a healthy and progressive community might be expected to increase steadily, whereas the variations are extreme and unaccountable. In 1869 the difference of gain was only 2850, but next year it reached 5407. In the following year it fell to 3071, and in 1872 it sprung up to 6097; for three successive years the surplus declined until 1876, when it suddenly advanced to

7024, followed in 1877 by 7269, the greatest advance ever recorded in the annals of St. Mungo. But in 1878 the advance retrograded to 6466, still a high figure, and greatly exceeding the average of eighteen years, which amounted to 5052." This section is illustrated by a table detailing the number of births and deaths from 1861 down to 1878.

The section treating of the rainfall is peculiarly interesting at this time, when so many minds are turned to the study of meteorology. It has become a vulgar idea that Jupiter Pluvius has taken up his residence somewhere in the Andes of America, and now rules the seasons by means of the Gulf Stream. The year 1878 was beneath the average of the watery element for a period of twelve years, but with this stranger variety, that the usual discrepancy between the former and the latter halves of the year has this last year been almost equalized. The reporter records eight other places in Scotland, with the amount of rain which the inhabitants enjoyed. "Juicy Stronvar," in Balquhidder, has somewhat lost the high character it held in 1877 for moisture, having descended from 103·20 inches to 63·30 in 1878. Paisley seems to have gone to the driest zone. In July it received not a single raindrop!"

The birth division presents some curious facts. It might be thought that the year of the largest population would give the largest number of births, but the fact is not so. In 1877 the births were 21,092, but in 1878 they fell to 20,614. The reporter solves the difficulty by reason of the fluctuating nature of the population, arising from strikes and variable trade and consequent wanderings. We do not fully understand the last reason he gives for this paradox. He thus writes: "We must not forget the Irish element, which so largely and usefully enters into the composition of our population, and which although *continually arriving, is so rarely noticed to depart.*" Some remarkable facts are repeated which appeared in former years. September of all the months in the year gives both the lowest rate of births and deaths. The preponderance of male births is, as before, agreeable to the universal rule in almost all European countries—21 boys to 20 girls. In 1878 the births in Glasgow were 10,543 boys and 10,071 girls. Notwithstanding this preponderance of the masculine race at birth, after the age of fifteen the circumstances change, and until the close of life feminine existence preponderates. The earlier months of the year are the favourites for births, and May, eschewed for marriages, has its revenge by adding more to the population than any of its sister months.

In the section given to the marriage tie the reporter proudly observes that it illustrates the natural prudence of the population, indicating the condition of trade and commerce. The number has fallen to 4400, being below the number of any year since 1868. In the heyday of prosperity the year 1872 gave 5121 as the marriage rate.

As regards the death rate the remarkable fact is stated that the

mortality was so light that it actually amounted to only a fraction beyond that of the average of eighteen years, during all which there was a steady annual increase of population. There is repeated the mournful and inexplicable statement of infantile mortality. Of 14,148 deaths recorded in 1878, so many as 6686 were those of children under five years of age, and the one-half of which were under a single year of existence! The reporter reflects on these facts, and suggests that some judicial inquiry ought to be made in these cases, "to ascertain, to a certain extent at least, some of the more exact reasons why such an enormous proportion of infantile mortality should encumber our records and compel us to deplore its presence." This is especially a matter for the jurist. It is impossible to read the public papers without learning cases of infanticide which generally are undiscovered, or where brought to light, a plea or verdict of "concealment of pregnancy," followed by six or nine months' imprisonment, is inflicted on the mother, who without moral if not legal doubt has deprived her infant of life.

There are a variety of other details and tables bristling with figures, but which being of a mere *local* character we pass over. Nevertheless we must add our meed of praise to the indefatigable industry which has compiled these comprehensive and exhaustive reports and tables. They are indeed most valuable, and it is only by such a series, and comparing each successive year with others which have gone before, that true and reliable data and material can be found for legislation. It would be well that other officials, even of towns of much less size and importance, would follow the example of the Chamberlain of the West, and publish annual social statistics from which general rules of political economy might be gleaned with safety.

H. B.

PROOF OF INNOMINATE CONTRACTS.

ERSKINE is inclined to hold that agreements not distinguished by the name of any known contract can, except in cases of trifling importance, only be proved by writ or oath. The reason which he assigns for this is thus stated by him (IV. ii. 20): "In contracts which lay mutual obligations on both parties, naturally flowing from the contracts themselves, their meaning can hardly be misapprehended by witnesses; whereas in verbal agreements, in which the articles to be fulfilled by the parties do not necessarily arise from the nature of any known contract, but depend entirely on the import of the words uttered by the parties, inattentive hearers may, either by misplacing what was spoken, or by mistaking the true meaning, be apt to change the obligation into something quite different from what the debtor intended." Much said by Erskine

relating to probation, sound as it was according to the light of that day, is now of course obsolete. The old system was to exclude all evidence which, either from the position of the witness—his interest it might be or relationship to the parties interested—or from the nature of the subject-matter, was open to suspicion. We have come gradually, and not even yet completely, to adopt another principle—to admit evidence for what it is worth, even when clearly suspicious, inviting light from all quarters, although its value must depend upon its source. But this *dictum* of Erskine cannot be said to be obsolete, although it must be accepted with caution. Our most recent writer on the law of evidence indeed calls in question its soundness, and says, "It does not appear to have been adopted in practice; on the contrary, the tendency of several decisions is against the rule" (Dickson, i. 372). But since the text of his work was written the question has been raised and decided in favour of Erskine's view. For in the case of *Edmonston* v. *Edmonston* (June 7, 1861, 23 D. 995) Lord Benholme in giving judgment said, "It is clearly the law of Scotland, not only in regard to heritage, but also in regard to moveables, that innominate contracts, especially such as are of an unusual character, cannot be constituted verbally or proved by witnesses." This may be accepted as a true definition of the law. The mere fact that a contract may deserve to be placed in the category of the innominate is not sufficient to exclude parole proof, but if in addition it be of an unusual character, unlikely and unheard of, then the proof is to be limited. In Edmonston's case there was alleged a verbal agreement between the pursuer and a deceased brother, by which the latter was to leave all his property to the former on condition of his settling as a medical practitioner in the deceased's neighbourhood. In the very recent case of *Forbes* v. *Caird* (July 20, 1877, 4 Ret. 1141) Lord Deas observed, "There is no such rule as that no innominate contract can be proved by writ or oath. But it may be stated to be a rule that a contract of an unusual or anomalous nature can be proved only by writ or oath." In the same case the Lord President said, "I am very unwilling to go back on that not very well fixed and somewhat abstruse doctrine about the difficulty of enforcing innominate contracts. It is not easy to reconcile all the dicta." This is not surprising, as judges are certain to differ upon the question what constitutes an unusual or anomalous contract. In the case of *Johnstone* v. *Goodlet* (July 16, 1868, 6 Macph. 1067) the relatives of a deceased wife sought implement of an alleged agreement by a husband to execute, as a counterpart of a discharge of their rights by them, an irrevocable deed leaving to the children of one of them a sum as great as the defender had derived in right of his wife from her father's estate. The following remarks occur in Lord Justice-Clerk Patton's judgment: "I entirely concur with the judgment in the case of Edmonston, and in the principle then recognised that innominate contracts of an

anomalous and unusual character cannot be constituted verbally or proved by witnesses. This agreement coming under that description, can therefore, in my opinion, only be proved by writ or oath. The principle applied in Edmonston's case clearly applies here. If an agreement to leave all one's property to a particular individual were provable *pro ut de jure*, the law as to the execution of testaments would be superseded. Writing on such a subject is requisite to express the fixed and settled determination of mind, because the lubricity of parole testimony would make it very difficult to distinguish between words of mere intention and those of engagement or obligation; they might easily be confused." In 24 D. 19 will be found the report of a case decided in 1853, in which the Inner House, affirming the judgment of Lord Rutherfurd, held it incompetent to prove *pro ut de jure* that a law agent had undertaken business gratuitously, looking for recompense from the opposite party. The Lord Ordinary said in that case: "The defender proposes to instruct his averments by parole evidence, for he does not refer to the pursuer's writ or oath. He has been unable to produce any authority for instructing *pro ut de jure* such a limitation of liability. He refers to the rule of law, that any of the nominate contracts, such as sale, may be proved by parole evidence, and he maintains that the employment he avers is a case of proper mandate, or at least that it falls under what the law of Scotland holds to be a nominate contract, that of agency or factory being mandate for hire. There can be no doubt that the employment of a law agent is not a case of proper mandate according to the civil law, but that in its own nature it implies remuneration, the rate of which is fixed by the table of professional charges and fees. The rule of law to which the defender refers as allowing proof by parole of nominate contracts, is that the mutual prestations are fixed by law; and though they may vary in amount as the price in sale, yet in themselves they do not depend upon the agreement of parties in each case. But here the defender, under colour of proving by parole evidence a contract of which one of the known prestations is remuneration, proposes to prove that in this case it was gratuitous, that is to say, divested on one side of its proper prestation, in other words, that the pursuer made a gift of his professional services" (*Taylor* v. *Forbes*, Jan. 13, 1853). It may be instructive to compare the above case with that of *Forbes* v. *Caird*, already referred to. Here the action was at the instance of one innkeeper against another. The pursuer sought to recover a sum of money alleged to be due for stabling the defender's horses. These horses ran in an omnibus in connection with the railway, and it was pleaded in defence that by agreement the defender was to get stable accommodation free of charge in consideration of the omnibus going to the pursuer's inn after calling at the railway station, and again starting from his inn. The Sheriff, going mainly upon the case of Taylor, restricted the proof of this agreement to the writ or oath of the

pursuer. But the Court of Session without any hesitation reversed. The Lord President put the case in this way: "The pursuer says, You are to pay me the ordinary rates for stabling your horses. The defender says, No, the consideration was the advantage given to your hotel over the rival hotel by running the omnibus to and from it. That is one of the most simple and everyday contracts, and just a case for a proof at large. The case contemplated by Erskine was a contract in which the material stipulations are not of a usual kind, and do not flow naturally from the contract." This case was accordingly remitted back to the Sheriff Court for proof. The present writer is in a position to state the result of the proof. The defence was very clearly established. Not only was there satisfactory evidence of the agreement maintained by the defender having been entered into, but without such an agreement it was impossible to account for the conduct of the pursuer, who, while he settled his other accounts with the defender yearly, allowed this alleged claim to remain over for years. And yet, had the Sheriff's view of the law been upheld, the pursuer must have triumphed.

Closely connected with this question of innominate contracts is that of how a compromise may be proved. Mr. Dickson (i. 371) says, "Transaction or compromise regarding moveables may be proved by writ or oath of party, but not by parole except in trifling matters." He, however, quotes the case of *Jaffray* v. *Simpson* (July 1, 1835, 13 Sh. 1122), in which Lord Moncreiff stated in his charge to the jury "that the question whether any agreement entered into was a compromise or not depends on the whole evidence, written and parole taken together." And in the later case of *Thomson* v. *Fraser* (Oct. 30, 1868, 7 Macph. 39) Lord Justice-Clerk Patton remarked that after the case of Jaffray it did not appear that proof of a compromise was limited to writ or oath. In this same case Lord Neaves said, "As to the mode of proof I have no difficulty in holding that a proof *pro ut de jure* is competent. The statements in some of the law-books on this point are unsatisfactory. 'Innominate contracts,' it has been said, especially such as are of an unusual nature, cannot be proved by witnesses. That appears to me a very indistinct statement of the law. A contract of an extraordinary or unusual nature may only be provable by writ or oath, but I do not think it a general rule that innominate contracts can be proved only in that way. A plain contract like this, even though it were held to belong to the class of innominate contracts, which I doubt, may in my opinion be proved by parole." The decisions upon these points perhaps indicate a gradual departure from the rules of law framed at a time when there seems to have been a positive reluctance to admit evidence.

NOTES UPON AN ENTAIL CASE IN 1868, AND ITS BEARING ON THE PROPOSED CHANGE IN THE LAW OF ENTAIL.

THE pages of this Journal for the month of July contained an article which went pretty fully into the presumed objects of the Entail Amendment Bill for 1879. The writer was apparently desirous of tracing the gradual development of a wider and easier system as regards entails, indeed he seemed to think that the first stage in the process of disintegration had commenced with the first amending Act, and that by neither few nor slow steps that process was advancing to the end. We venture to supplement the remarks already made by a few observations on a case which recently has come specially under our notice in turning over the pages of the second volume of the newly issued work on Scotch Appeals, 1853-1871, by Mr. James Paterson. That case is reported as *Campbell* v. *Breadalbane's Trustees* (Paterson, Sc. App. ii. 1547), and has two features of interest when the amending bill of this year (unfortunately only a bill) is considered. The Marquis of Breadalbane had obtained decrees of declarator under the Montgomery Act to charge £25,000 odd against his entailed estates. To the finality and form of these decrees objections were unsuccessfully taken, but with that portion of the case we are not proposing to deal. Having then obtained these decrees under the older statute, his Lordship proceeded subsequently in 1859 to avail himself of the forms of the then comparatively recent Rutherfurd Act, and by taking proceeding in the Court, obtained a decree upon which he acted, executing a bond, but only to the extent of £20,000, for an annual rent-charge, and he died in 1862. The first point in the action and in the appeal which we shall notice turned upon what course was to be taken as regards the £5000 of difference after the death of the Marquis in a question between the new heir of entail and the executors of the deceased. Here were two Acts, both standing unrepealed, each prescribing a form for proper constitution of such charges as debts against the entailed estate. The proprietor had fully availed himself of one mode of procedure, and then partially of another, was this, *quoad* the sum not included in the bond, an abandonment of the older statute, or did that balance still fall to be ruled by the decree under the Montgomery Act, and become consequently an asset of the executry? The Lord Chancellor (Cairns) pointed out that the differences of the two statutes rendered the first alternative alone admissible, for that under the earlier Act there was a condition annexed to all charges fixed by the decrees of declarator, namely, that at the death of the heir in possession they should not exceed a certain number of years' value of the estate charged. Under the Rutherfurd Act, on the

other hand, no such condition existed, and any heir obtaining such decree became an absolute creditor of the estate for its amount. "But," his Lordship added, "the difficulty becomes much greater when we remember that a bond for £20,000, part of the £25,000, had actually been issued and is in force under the Rutherfurd Act. For the question immediately arises thereupon, If the £5200 is to be recovered, not under the Rutherfurd Act, but under the Montgomery Act, in what way can you apply the provisions of the Montgomery Act as regards the relation between the sum charged and the annual value of the land which is to be taken into account? It appears to me that, upon that ground alone, it would be impracticable for the representatives of the late Marquis to work out any remedy in respect of this sum of £5200 under the earlier Act of Parliament. Further than that, we must remember that the consequence of holding both these Acts of Parliament to be operative as to one charge would be this, that the present heir in tail would have to pay in respect of the bond issued under the Rutherfurd Act a certain annual sum or a certain gross sum. If the Montgomery Act is also to be put in force against him, and if he were unable to pay the sum of money in respect of which it was put in force, his only alternative would be to surrender one-third of the annual income of the estate for the purpose of payment. He might thus be harassed in the most serious and inconvenient way by the double operation of the two Acts of Parliament." Lord Westbury also was clear that of the two alternatives one must be taken by the person charging. It was scarcely possible, he thought, to make the remedy given by one statute apply to part only of the money, and leave him or his representatives full power as regards the rest of it to use the remedy provided by another statute. The remedies and rights were differently enacted, and by adopting the course of permitting the application of both Acts it became "impossible to ascertain with certainty how much of the remaining £5000 was to be attributed to that outlay in respect of which there was a more restricted right, and how much was to be attributed to the outlay in respect of which there was the larger right."

This portion of the case illustrates very well the difficulties an entail interposes between proprietors and the true ownership of their lands. All sorts of questions of a like nature might arise. Thus, from observations made by the Lord Chancellor, we must conclude that in some circumstances the abandonment of the claim under the older Act would not have been inferred merely from the granting of a bond under the more recent statute. It is evident that where two Acts thus come to apply to one estate, the utmost care is necessary, unless the rights under one of them are to be abandoned.

The second feature of this judgment to which we shall refer was connected with another but simultaneous appeal. The Marquis

of Breadalbane died four days before the term of Martinmas 1862, and the dispute arose as to certain sums expended by him in improvements during the year (less four days) from the Martinmas preceding his death. The requirements of the Montgomery Act (section 12) are as follows: "The proprietor of an entailed estate who lays out money in making improvements upon his entailed estate, with an intent of being a creditor to the succeeding heirs of entail, shall annually, during the making such improvements, within the space of four months after the term of Martinmas, lodge with the Sheriff or Steward Clerk of the county within which the lands and heritages improved are situated, an account of the money expended by him in such improvements during twelve months preceding that term of Martinmas, subscribed by him, with the vouchers by which the account is to be supported when payment shall be demanded or sued for." Of course in the instance in question there could be no such subscription, and the executors signed and claimed payment. The House of Lords sustaining the view of the Court below, unanimously affirmed the proposition that such a signature was sufficient. Lord Westbury referred to the maxims *nemo tenetur ad impossibile*, and *actus Dei nemini facit injuriam*, to show that where a statutory requisition cannot be fulfilled, through no default or act of him who fails, the law ever takes a benignant course. "The words," said Lord Cairns, "are simply by way of enactment although the section commences with the word 'provided,' the enactment being for the purpose of securing, if it can be secured, the written testimony and statement of the person who has made the improvements, that they have been made in the manner in which they ought to be made in order to found a claim. If by the act of God it becomes impossible that the claim can be signed, it appears to me that it would be construing the Act of Parliament in a way in which no clause of the kind has ever been construed, if we held that where the act of God thus prevented a compliance with the words of the statute, the proprietor or his representatives should thereby be prevented from making a claim for improvements." Applying these observations to the bill of 1879, we cannot fail to be struck by the fact that one great intention of that proposed measure is to prevent the act of God by death or otherwise causing serious loss to those entirely free from blame. As matters stand now, the maxim quoted by Lord Westbury, *actus Dei nemini facit injuriam*, is not true where entails, or rather disentails, are concerned. Presumably the benignant doctrine might be put in force in such a case, for example, as that of a man who suddenly expired when just about to sign his will in the presence of witnesses. There the will, though wanting the all-essential signature, might receive effect as though duly executed without any great expansion of the principle laid down in *Campbell* v. *Breadalbane's Trustees*, and we believe it would be so held. But where a step is to be taken the execution of which no one of the objectors

can prevent, is it reasonable that power should be given them in the first place to create delays, and in the next to reap the advantage of a death in the overthrow of all the proceedings? We trust that the bill may pass now, and though no doubt that is too sanguine a hope at this late period of the session, at least we may cherish the anticipation of seeing it again introduced on an early day.

THE LAW OF TROUT-FISHING.

CONSIDERING the present prevalence of unlimited poaching, and in the absence of any close time, trout-fishing, at least in the south of Scotland, will soon be a thing of the past, so it may not be without interest to consider what powers are possessed by the owners of trout-fishings for the protection of their property.

A distinction is drawn between public and private rivers.

In a public navigable river, the right of fishing for white fish, so far as the tide ebbs and flows, is common to all. The reason for this is said to be "because such river participates of the nature of the sea, and is said to be a branch of the sea so far as it (the tide) flows" (Sir John Davies' Report of the Banne Fishery Case).

In private rivers and lochs, the right of trout-fishing belongs to the proprietor of the *solum;* it is a pertinent of the land, and does not depend upon the fact that the proprietor is the only person who has right of access to the water. A right of way running along the banks of a river or loch will give the public no title to fish in a private water, even though they may have fished there for longer than the prescriptive period (*Ferguson* v. *Shirreff*, 18th July 1844, 6 D. 1363).[1] Neither have they a right to fish from a highroad or ford, or from a bridge or boat. An agricultural tenant is not entitled to fish for trout with rod or net in the streams or lakes upon his farm, the right of fishing being impliedly excepted out of the lease and reserved to the landlord. If the tenant fish with net, without permission, he is liable to the penalties of contravening the Act 8 and 9 Vict. c. 26 (*Copland* v. *Hon. M. C. Maxwell*, House of Lords, Feb. 28, 1871, Scot. Law Rep. viii. 450; and *Duke of Richmond* v. *Dempster*, Jan. 14, 1861, 4 Irvine, 10). Fishing by means of nets, for trout or other fresh-water fish, in any river, water, or loch in Scotland, by persons not being the proprietors of the *solum*, and not having permission from such pro-

[1] This case definitely settled the question of the non-prescription of trout-fishings, as between the public and the proprietor of the *solum*. The point was again unsuccessfully attempted in the case of *Campbell* v. *Arkison and Clark* (reported in the *Edinburgh Courant*, 7th Sept. 1875), where the respondents pleaded immemorial usage; but as it was admitted that the river (Ayr), at the part of its course in question, is not navigable, and is many miles inland, and is some hundreds of feet above the (level of the) highest flow of the tide, the Lord Ordinary (Marshall) had no difficulty in granting interdict, holding that any usage of fishing must be ascribed merely to the tolerance of the owners.

prietors, is made penal by 8 and 9 Vict. c. 26 (1845), and the words *river*, *water*, or *loch* include any stream, burn, mill-pool, mill-lead, mill-dam, sluice, pond, cut, canal, or aqueduct, and every other collection or run of water in which trouts and other fresh-water fish breed, haunt, or are found or preserved.

Persons found netting, or trespassing with intent to net (and the possession of nets is declared to be sufficient evidence of intent), may be seized *brevi manû* and detained by any person, and carried before the Sheriff or any Justice of the Peace in the county, or may be handed over to a constable, who is required by the Act to take them before a magistrate.

Boats, nets, and fish may also be seized and detained. The penalty for every such offence is a fine not exceeding £5, together with the full expenses of the conviction, besides forfeiting the boats, nets, and fish.

This Act is extended by 23 and 24 Vict. c. 45 (1860), which also prohibits fishing by means of double-rod fishing, or cross-line fishing, or set lines, or otter-fishing, or burning the water, or by striking the fish with any instrument, or by pointing, or putting lime or other destructive substance into the water, or trespassing with intent to fish in any of the above ways. It is to be observed that this Act does not apply to proprietors and those having permission from them, but of course if they carry on these operations to such an extent as to injure the rights of others they can be restrained by interdict.

By 31 and 32 Vict. c. 123 (Salmon Fisheries, Scotland, 1868), a penalty is imposed upon every person using fish-roe for the purpose of fishing, and on every person buying or selling salmon-roe, or having it in his possession, except for some legitimate purpose.

Fishing by a trespasser with single rod and line is not penal, and the only way to proceed against such a person is by an action of trespass, or better, by petition for interdict. There is no difficulty in such a case where both banks are the property of the same person, but the question sometimes arises, whether the owner of one bank is entitled to interdict against a trespasser on the opposite side, the owner of that bank not caring to interfere. This question was incidentally referred to in *Somerville* v. *Smith* (Dec. 22, 1859, D. 279), the rubric of which case, by the way, is decidedly misleading.[1] The Lord President (M'Neill) there said, "I do not mean to pronounce any judgment here that will affirm that proposition, that a party having no right at all in himself, and not having right from any other person, is entitled to fish for

[1] What *was* decided was simply that the proprietor of one bank, who has the exclusive right to the salmon-fishings, cannot prevent the proprietor of the opposite bank from fishing for trout *ex adverso* of his own lands, or from giving leave to others, so long as the fishing is conducted in a legal manner, and is not made a pretence of for the purpose of disturbing the salmon and injuring his rights.

CONTEMPT OF COURT.

CONTEMPT of Court may be manifested in two ways, either by insulting or treating with deliberate disrespect Judges or their officers, or by disobedience to judicial orders, which is held to imply a contempt for those who have pronounced them. Fortunately our reports show few instances which come under the first class. Our Courts are very generally respected, and rare indeed is the case of any one foolhardy enough to violate public decency by behaving in an unseemly manner in presence of any Judge, be he of a supreme or inferior tribunal. This is fortunate for the Judges themselves; for it is difficult to imagine a more trying position than that of one called upon to punish an act under circumstances which may fairly be supposed to have excited personal feelings—to vindicate the office while ignoring altogether the holder of it. With regard to cases of implied contempt, it must be borne in mind that they may arise apart from moral guilt. Thus under the English County Court administration, failure to pay the expenses decerned for is treated as contempt of the Judge who has ordered payment and punished with imprisonment. And yet this is just a roundabout way of imprisoning for debt. Poverty cannot be made a crime by calling it contempt of Court. Again, until legislative interference cleared the way for tender consciences, witnesses who declined to swear might be liable to suffer for contempt. The most frequent illustration of constructive contempt of Court is afforded by proceedings for breach of interdict, and our readers will recollect how but the other day the Lord President of the Court of Session awarded one month's imprisonment to two men who had been convicted of such a breach.

It may not be uninteresting to notice a few of the cases which form illustrations of what has been considered and dealt with as contempt of Court. Of actual insults offered to Judges there are, as has been already said, few instances. We find, however, the Lord Advocate taking proceedings against a Writer to the Signet for having "written and transmitted to the Lord President of the Court of Session a letter reflecting on his judicial conduct, containing matter disrespectful and insulting to the Court and injurious to the administration of justice." The accused was cited to appear before the assembled force of both Divisions, and although he at first seemed to aggravate the offence by taking an objection to the summary mode of trial, he afterwards duly acknowledged it. The Court, it is reported, found "that he had been guilty of a high offence against the dignity of this Court, and which tends to prejudice and slander the due administration of justice therein, and in having done so has rendered himself liable to severe animadversion and punishment." He was then reprimanded in public, and ordered to find caution for good conduct towards the Court under

But here it is a remarkable feature of the case, which we must bear in mind, that *ex concessis* of both parties on the record, and as plainly on the proof, this is a narrow stream, which even in rod-fishing is fished from bank to bank with every proper cast of the salmon-rod; and any fishing on the opposite bank into the same water is necessarily an encroachment upon the area of water over which Sir John Stuart is entitled to fish; and therefore I have no doubt that in this case Sir John Stuart is entitled to challenge the fishing on the opposite side of the water, if it were by a mere trespasser."

In the case of the *Earl of Zetland* v. *Tennent's Trustees* (26th Feb. 1873, 11 Macph. 469) the Lord Justice-Clerk gave it as his opinion, that the usage and practice has been that the proprietor on one bank uses his right of fishing across the stream, and the proprietor on the other bank does the same. His Lordship, however, probably intended this to apply to the case of a small river or a river of such a character that fishing operations could not conveniently be carried on from one side only.

The rule, then, in the absence of any express decision, may be taken to be—

(1.) Where a proprietor of one bank has the sole right to the salmon-fishings, he will be found entitled to interdict against a trespasser on any part of the river within the limits of his right of salmon-fishery.

(2.) Where the opposite proprietors have each right to the salmon-fishings: in the case of a broad stream it is doubtful, and will probably depend upon the manner in which the parties have exercised their rights of fishing; in the case of a narrow stream (and the measure may be taken to be that of a fair cast of a salmon-rod) either party will be entitled to interdict trespassers upon the opposite side.

(3.) Where neither party has right to the salmon-fishings, it would appear to be *jus tertii* to interfere with a trespasser on the opposite side so long as he fishes in a perfectly legal manner and does not cast his line beyond the *medium filum aquæ*, provided always that the trespassing is not carried on to such an extent as to injure the fishing, in which case, of course, the opposite proprietor would have a clear interest to interfere.

In England there is a close time for trout and other fresh-water fish; in Scotland there is none. It is suggested that the annual close times fixed by the Commissioners under the Salmon-Fisheries (Scotland) Acts might with advantage be extended to trout. Surely this is worthy the attention of some one of our Scottish legislators.

W. S. C.

right to fish for trout in any part of the river within the limits of his salmon-fishings, although his right was not exclusive as regards the opposite proprietor.

who is well entitled to our protection, but was an insult to the Judge before whom the process depended, and to the Court itself. I consider that an explicit apology is due to the Court as well as to the clerk."

As is natural, it is in the records of our criminal courts that we find cases of actual insolence offered to the majesty of law. To behave contemptuously upon receiving sentence—to appear in Court in a state of intoxication—to refuse without reason to take the oath as a witness, or having taken it, to refuse to answer the questions put, or to prevaricate in giving evidence, are all instances of conduct treated as contempt of Court, and punished accordingly. Oddly enough nearly all these illustrations will be found in one volume of the Justiciary Reports, that of Shaw.

Nicer questions arise when the act complained of is one of interference with the functions of a court of justice. What amounts to this it may be rather difficult to say. In the peculiar case of *Paterson* v. *Kilgour* (July 18, 1865, 3 Macph. 1119) we find a difference of opinion amongst the Judges. This was an action for repayment of a sum of money alleged to have been obtained by the fraud of the defenders. The pursuer was an old lady, and one of the defenders wrote to her, sending a copy of the record, intimating that he intended to make her take the oath of calumny, and warning her of the great sin of perjury. He wound up by saying, "I now leave the matter to your careful and calm consideration, and to your own conscience, as to what you should do when your oath is required." The letter having been laid by her before the Lord Ordinary, he by interlocutor found that the defender by writing and sending it had "improperly and unwarrantably interfered with the due and ordinary administration of justice," and had thereby committed a contempt of Court. He was accordingly ordained to appear personally at the Lord Ordinary's bar for censure. The defender brought the matter under the review of the Inner House, when the majority of the Judges concurred in the opinion of the Lord Ordinary. The Lord President thought the object of writing such a letter was to deter the pursuer from taking the oath of calumny. "Was that a wrong thing for the defender to do, and was it an interference with the course of justice cognisable by the Court? It was certainly a very wrong thing to do, and I think it was also an interference with the course of justice." He further thought it was of no consequence whether it could be called a contempt of Court or not, it was certainly an interference with a person under the protection of the Court as a litigant. Lord Deas was clear, on the other hand, that unless the writing of the letter came up to a contempt of Court, no cognisance could be taken of it. "Contempt of Court," he said, "is a criminal offence, punishable in the most summary way by censure, fine, or imprisonment. It may be either direct or constructive. It is direct when Judges are themselves the objects of it. It is constructive

when the ends of justice, as judicially administered, are unduly interfered with. When it is constructive merely, it is all the more necessary to be cautious in exercising a jurisdiction so serious and summary. I am not for spelling it out of a private letter by one litigant towards another which contains nothing that can be properly termed intimidation. It would never do to make mere improper or even insulting expressions used by one litigant towards another in private letters the subject of instant and arbitrary punishment. That would not be a safe or salutary jurisdiction for any Court, and still less for every Court to possess." His Lordship was, however, of the opinion that if the letter in question had contained any threat of exposure or injury, it would have amounted to contempt of Court. The defender was censured and found liable in the expenses to which this proceeding had given rise.

In the case of *A. B.* v. *C. D.* (February 27, 1834, 12 Shaw, 504) we find a party censured for having, without any professional qualification, acted as an agent in a cause, and affixed the name of a practitioner without his consent. "The usurpation of the function of an agent is an offence which the Court must severely reprobate, as one which would lead to the most mischievous consequences if not peremptorily checked" (*Per* Lord President). A Judge is quite entitled to order the imprisonment of any party removing part of a process contrary to the orders of the Court (*Watt* v. *Ligertwood*, House of Lords, April 21, 1874, 1 Rettie 21). In this case an agent would not allow the Sheriff-Substitute to write his interlocutor upon a petition for interdict, but took it out of Court after interdict had been refused, and destroyed it in his own place of business. In the case of the *Lord Advocate* v. *Galloway* (December 4, 1839, 2 Swinton, 465) the fine of £100 was imposed upon the cashier of a bank who had given up a suspected bill to a third party, and thus obstructed justice.

It is not likely that at this time of day the Court would be disposed to treat as an act of contempt the publication of any judicial proceedings. But we have heard a high legal authority express the opinion that a certain favourite mode of reporting proceedings in Court for the daily press was illegal. The serious mischief which may arise from the publication of *ex parte* statements has already been pointed out in these columns. How frequently do we see in the newspapers a long narrative containing sundry grave charges against a defender whose name and address is given, and winding up with the statement that defences are not yet lodged. The case may be compromised and defences never lodged, and thus the public know nothing of the other side of the story; or some compromise which would have been the best and cheapest thing for all parties may have been knocked on the head just in consequence of this offensive publicity. In the case of the *Lord Advocate* v. *Prentice* we find a complaint lodged accusing the defender of having published a false or slanderous representation

of certain proceedings taken against him for contempt of Court, "calculated and intended to libel and defame the Right Hon. the Lord Justice-Clerk as President of the Second Division of the Court, and to bring into contempt and hatred the dignity of the Supreme Court and the administration of justice therein." But no decision was pronounced. In *Gilfillan* v. *Ure and others* (May 18, 1824, 3 Shaw 21), a complaint to the effect that the pursuers of an action for damages were circulating a large number of printed copies of the summons, which contained injurious expressions, was sustained, and the offending parties ordered to recall and deliver up the copies. In *Henderson* v. *Laing* (December 10, 1824, 3 Shaw, 384) the publishing and circulating during the dependence of an action of a statement tending to create an impression unfavourable to one of the parties was treated as "improper and unwarrantable interference with the proceedings of the Court." (See also the case of *M'Lauchlan* v. *Carson*, December 16, 1826, 5 Shaw, 147.)

Where the contempt of Court arises from a breach of its orders, it may be a question whether the party was really acquainted with such orders. The decisions seem to indicate that if an order is known to exist, any informality in the manner in which the offender became aware of it will not save him from the penalties incurred by its violation. There seems no particular form necessary for the intimation of interdicts. "Mere private knowledge that the Court granted it may not be sufficient, as the party obtaining an interdict may, after it is pronounced, decline to use it. But knowledge caused by an act on his part used for the purpose, sufficiently substantiated and preserved in evidence, seems to be the substance of what is required to make an interdict binding" (*Per* Lord Mackenzie in *Clark* v. *Stirling*, June 14, 1839, 1 D. 970).

As every Court has power to maintain its own dignity, it is incompetent for even the Supreme Court to punish the breach of an interdict or other order of an inferior tribunal (*Munro* v. *Robertson's Trustees*, June 24, 1834, 13 Shaw, 788).

THE MYSTERY OF DRUMDEWAN.

THERE are few localities in Scotland where in so short a space there can be found at once the romance of scenery combined with that of history than on the road between Tay Bridge and Fortingall, in Perthshire. Leaving the now increasing town of Aberfeldy by the bridge, with its spiral ornaments, built by General Wade soon after the Rebellion of 1745, the traveller reaches the little village of Weem, with its lofty, wooded crag, at the base of which is situated the ancient palatial Castle Menzies, with its blood-stained room, telling of ancient feuds. The locality is known as

Appin or Appindhue. The village of Dull is soon reached, said once to have been a seat of ancient learning before St. Andrews had assumed that character. The river Lyon unites its waters with the river Tay beside an ancient fortalice. Passing the hamlet of Coshieville, the village of Fortingall is reached. The "Gazetteer of Scotland" describes the parish as having "caverns and deep recesses beneath the overhanging cliffs, and in some instances remarkable and for the most part associated either with tales of ancient feuds and warfare or with the gross legends of credulity and superstition." In the churchyard there still may be seen an ancient yew of gigantic dimensions, at one time being in circumference no less than fifty-two feet. Here, too, is in fine preservation the *pretorium* of a Roman camp. Indeed it is not unlikely that the name of the parish (Fortingall) is derived from this fort in the land where Roman legionaries found it necessary by forts and strongholds to shut out the warlike tribes of the north. Drumdewan, the abode of the man of this sad story, is about a mile from the Kirk of Dull and about a couple of hundred yards from the highway. His mysterious fate has not been forgotten in the locality, and adds somewhat to the romance which has long been associated with this territory.

Alexander Menzies had long been the tenant or crofter of Drumdewan. He rented it under the patriarchal Sir Neil Menzies of Castle Menzies at the yearly rent of £40. The crofter was aged upwards of fifty. He never had been married, and resided with two maiden sisters, one his senior and the other his junior. He was respected as a man of good and honest character, social and cheerful in his deportment. He was generally sober in his habits, but in the custom of attending the numerous markets and fairs in the neighbourhood. Before the iron highways had penetrated the region of the Grampians these great periodical meetings were the only occasions when business was transacted and friends met in social gatherings. On such meetings Alexander was very social, and occasionally indulged in the favourite beverage of the people to a greater extent than what was prudent. He never was quarrelsome in liquor, but was ever in the best of humour. A general favourite, he was not known to have made an enemy. He was somewhat, but not much, in debt, and there was no depression of mind so as to lead to any suspicion of suicide.

One of the greatest of the markets in the Perthshire Highlands was annually held at Fortingall on the second Thursday of December. Farmers, crofters, and servants all congregated at this market, and yearly accounts were then adjusted and settled. Wool merchants from great distances attended at this rural Exchange and bought the last clip from the sheep farmers and settled old accounts, so that much money passed from hand to hand, and not unfrequently got into dishonest possession.

In the year 1838, the great market of Fortingall fell on

Thursday the 6th December. On the previous evening Alexander had gone to the village of Dull, where he received a £1 note as part payment of an account. He returned late in the evening. Next forenoon, about eleven o'clock, he left his cottage for the market, never again to return to his homestead. He had on a blue Galashiels short coat for the first, and, as it happened, for the last, time. The customary flat blue bonnet was on his head, a Highland plaid covered his shoulders, and, with his usual short staff in his hand, he set forth to the great market. He had in his pocket the £1 note received the previous night, and 6s. in silver and copper money, carefully counted by one of his sisters. He carried with him, as was his custom, a tin snuff-box. He was a considerable consumer of its contents, and was very generous in offering them to his friends.

The market was as usual very crowded. There were tents for the transaction of business and also for the sale and consumption of whisky. The only inn was densely crowded throughout the day. The rooms were placed under the superintendence of several servants and others hired for the occasion, and were not wholly cleared until far in the morning of next day. Menzies was seen often throughout the day both in tents and the inn, and with many and different countrymen. Especially on two separate occasions he was paid by two countrymen £5 each in notes of that value. He never kept a pocket-book, but was seen to place the notes in one of his breeches-pockets. He never was known to use the receptacle for snuff as a repository for money. The last time that any trace of him was seen alive was between seven and eight o'clock, and no person could speak as to the time he left the market. Though he had been occasionally "tasting" with his friends, it was not shown that he was in any way intoxicated. The early part of the night after sunset was dark, but the moon arose between nine and ten o'clock, and continued to shed its light up to dawn.

Several of the people who attended the market loitered about the village and road till far on in the night. A party of that nomad race, the tinkers, had attended the fair to sell their tin vessels. As usual with them, they got intoxicated, and while in that state, as is equally their unfortunate custom, they fought with each other. The voice of a gipsy woman was occasionally during the night heard to cry "murder," which with them is a favourite but meaningless word. The most searching inquiry absolved these wanderers from any concern in the death of the crofter of Drumdewan.

The crofter not having returned to his sisters, an alarm was raised and inquiry made. The first article of suspicion was that on a part of the road westward of the village, and over which Menzies had not to travel homewards, there were found two pieces of coagulated blood and a handkerchief saturated with mud, or

"glaur," as it is more appropriately termed in Scotland. The handkerchief being shown to the sisters, was stated not to be that of their deceased brother. Strange as this coincidence was, nothing more could be traced as to the cause of these blood-marks, and the owner of the handkerchief could not be discovered. The next inquiry was as to the possibility of the man losing his way and falling into the river Lyon. The road was well known to him, and had often been travelled by him, both by night as well as day. There was only one spot where the road closely approached the Lyon. Menzies had called on a cousin at Coshieville in the morning when going towards the fair, and it was expected he would have repeated his call had he reached that place on his return homewards, which he did not.

On the Saturday search was made for the body by boats both on the Lyon and the Tay for several miles, but without success. The search was repeated on the Sunday, when at least 300 people were searching both in the woods and on the rivers, but still without any trace. Every pool, both in the Lyon and the Tay, was carefully searched, but all in vain. More or less, the search was continued for five or six days, but with equal want of success.

At length, on the 14th January 1839, the body of the crofter was discovered in a branch of the Tay near Dalguise, about nineteen miles from Fortingall. This was a month and some ten days from the day of the market. The Tay was then in flood, and this branch of the river was generally dry unless in such cases. The body was caught by a tree, and was carried into the church of Logierait, in the exact state in which it was found, to abide the examination of the authorities. The examination was made by two eminent physicians. The first remarkable feature which attracted their attention and that of others was the singular state of the clothes. The coat had been drawn over the head, and its back was over the breast. It was the opinion of all who examined the strange position of dress that no obstruction in the river could have thus changed the position of the coat. Such might have torn the garment, but there were no rents whatever. The coat was quite entire, and it appeared as if it had been thrown over the man's head, and forcibly drawn down on his breast, so as to place him as in a strait jacket, powerless to defend himself. This obviously implied that two persons were necessary for such a process—one behind and one before their victim. This mode of robbery is not unknown in large towns, but scarcely was to be expected in so remote a district. This led to inquiry as to the presence of strangers at the market, but which had no practical issue. There was next found in the breeches-pocket five shillings in silver money, with some few coppers, which showed that the crofter had not much indulged in refreshments at his own cost, but from his being so general a favourite he had probably been treated by friends. The next most astonishing fact was a £1 note being

found neatly folded in the snuff-box; and what was still more astonishing, there was the name rudely scratched on the tin, "Alexander Menzies." Such inscription never had been observed by either of his sisters or any of his neighbours, who often had the box in their hands. The two £5 notes were nowhere to be found on the person.

The medical opinions were decided that there were marks of blows on the head, and that "these were the cause of death, and had been inflicted before the body was put into the water, and that Menzies was dead before being so put." The body had passed into the state termed adipocere, and the opinion of the medical gentlemen was that it had been from five to six weeks in water.

Two persons connected with the inn were apprehended on suspicion of being concerned in the death, still there was no such case as warranted them to be put on trial. Though the coroner's inquiry is much abused in England, where juries are most unnecessarily called, to the injury of feelings in cases of sudden death, where there could not be the slightest suspicion of guilt, yet in such a case as that now recorded and others of the like kind there exists good reason for allowing such a public inquiry at the discretion of the authorities. Such opinion would frequently be of great advantage to the detection of guilt as well as to the shielding of innocence, too often assailed by idle gossip.

After a full investigation had been made, on the 10th April, Government (Lord John Russell being then Home Secretary) offered £100 of reward "for such information and evidence as might lead to the discovery and conviction of the murderer or murderers, and a gracious pardon to any accomplice, not being the actual murderer, who should give such evidence as should lead to the same result."

It would be surprising that in such a locality there should not have existed some features of superstition. A pedlar had been at the market on the fatal day, but had not seen Menzies there, though intimately acquainted with him. On a night soon after the body had been found, he declared that he was awoke by a voice at his door, which he recognised as that of his old friend Menzies, calling out, "Are you sleeping?" So sensible was he of the voice that he rose and opened the door, and, as might have been expected, found no person without. Returning to his bed, he stated that he dreamed he saw Menzies lying in a killogie or old lime pit with his face all black, and that a man on whom suspicion had been excited was seen as if coming out at a door. It was singular that there was such a place as he described near the village of Fortingall, and that the dress worn by Menzies that day was minutely described. The dreamer was said to be a trustworthy man, but his story only led to persons thinking that he knew more about the affair than he was willing to disclose.

The facts ascertained were:—

1st. That Menzies had not been drowned either by accident or design.

2nd. That he had been murdered, and immediately, or rather, as some thought, after some days, the body was put into the Lyon or the Tay.

3rd. That he had been robbed of the two £5 notes, and that this was accomplished by means of the coat being thrown over his head in manner above detailed.

4th. The murderers, with the view of concealing that there had been robbery, placed the £1 note in his snuff-box as a sure receptacle against the effect of water. The £1 could be fixed on him by the sisters, whilst the £10 might be more difficult to establish.

Lastly, The inscription of the name on the tin snuff-box might have been designed to establish the identity of the man, in case that bodily traces might in process of time have been obliterated.

Thus there must have been more than one person concerned, with no small deliberation and invention. The inscription of the name on the box led to the belief that the perpetrators were not unacquainted with their victim, that robbery was their aim, and that some of their artifices were designed to make it appear that there had been no robbery, but that the man had been drowned accidentally on his way home. Such is the romance of the Crofter of Drumdewan.

Reviews.

The Practice of the Court of Session. By Æ. J. G. MACKAY, M.A., LL.D., Advocate, Professor of History in the University of Edinburgh. Vol. II.

THIS handsome, perhaps too sumptuous and ponderous, volume completes a work which will be at once recognised as indispensable to every practitioner in the Court of Session, and as serviceable in a high degree to those whose lot it is to practise in the Sheriff Courts. The progress of legislation and the decay of technicality have proceeded so rapidly since the publication—now more than thirty years ago—of Sir C. F. Shand's book on Practice, that that book—never a great favourite with the profession—has now become antiquated more decisively than is usually the fate even of law-books a generation old. In its scope the present work reaches out nearly as far beyond the limits of its predecessor as that predecessor extends beyond the modest aims of the Parliament House Book, and the treatises of Mr. Coldstream and Mr. Spink. Mr. Mackay had at the outset to confront the leading difficulty of all books on Practice, and he hints that in adopting the course he has

actually followed he has had to run the gauntlet of much criticism on the part of public reviewers and private friends. It is scarcely necessary to look into such treatises as those of Reffter or Bethmann-Hollweg on the Roman Civil Process, or of Stephens, Selwyn, or Roscoe on Nisi Prius, to see wherein this difficulty consists. A book on Practice must draw the line somewhere between substantive and adjective law, between doctrine and procedure. On the one hand, it must avoid the mistake into which Nisi Prius works have notably fallen, of making the remedy a mere peg on which to hang a discussion of the wrong to be remedied. On the other hand, an exposition of the practice of a Court demands something more than an arrangement of Acts of Parliament and of Sederunt relating to procedure, and an abstract of forms of writs and interlocutors commonly in use. Archbold and Daniell in their works on common law and equity practice have set a good example, and, like them, the author of this work has, as it seems to us, contrived to adhere as if by instinct to the *via media* between these extremes in a manner which leaves scarcely anything to cavil at. His aim, as stated in the preface to the present volume, has been "to describe the existing practice of the Court in the sense in which it was understood by Lord Stair, who states that the matter is the same in the fourth book as in the three preceding books of his Institutions, though it is to be set forth in the forms of process, pleadings, and decisions." The way in which this aim has been carried out cannot be better observed than by contrasting the chapters on divorce with the corresponding chapters of the Dean of Faculty's work on "Husband and Wife." Perhaps the most slippery part of the way was that which led through the bypaths of Title to Sue. It was absolutely necessary to be at pains with the subject, since one would look naturally to a treatise on Practice, and nowhere else, for an account of the circumstances in which the Lord Advocate, members of the public, aliens, convicts, or outlaws, may or must be parties to an action, and for the mode of suing *in formâ pauperis*. But surely it is a hard fate which compels a writer on procedure to devote more than fifty pages to agents, mandatories, executors, heirs, co-owners, partners, married women, pupils, minors, insane persons, bankrupts, corporations, and associations, viewed as parties to a lawsuit. The rules applicable in each of these cases may be correctly and even usefully enough brought together in a work such as the present; but the grounds on which these rules rest can only be adequately set forth in the treatises which are specially devoted to these classes of persons.

It will be well to explain the scheme of the work before us, more especially since its bulk and the circumstance that the two volumes have been published at an interval of more than two years apart, have made it necessary to be content with a separate index and list of cases for each. The first volume sets out with a short history of the Court of Session, and reminds us pleasantly of that

curious learning which embellished—shall we say almost too lavishly?—the author's Memoir of Lord Stair. Then follows an account of the College of Justice and its members. Part II. deals with the jurisdiction of the Court and the subject of parties to a suit, to which we have already referred. The larger part of the volume is then taken up with the procedure in ordinary actions, from the summons to extract, omitting proof and expenses. The second volume, just published, starts with the procedure relative to proof, and passes on to procedure in special actions—accounting, declarator, furthcoming, multiplepoinding, reduction, reduction-improbation, suspension and its associates, consistorial, curatorial, and divisorial actions, maills and duties, poinding of the ground, proving the tenor and adjudication. Part VI., which deals with petitions, is especially valuable as going over ground in large part untrodden hitherto. Part VII. treats of appeals to (not from) the Court of Session, and suspensions and reductions of decrees. (By the way, we do not see any notice of the appeals from the Income Tax Commissioners and the Inhabited House Duty Commissioners, which are allowed by the Act 37 Vict. c. 16, regulated by Act of Sederunt, 8th January 1875, and are now constantly before the Court.) Part VIII. discusses expenses and audit. We have long looked for a separate treatise on these two matters, which have been perhaps left too much to the pure discretion of Judges and the tradition of an office. The rules which were formerly known to exist somewhere are now gathered together; and the concluding chapter on audit and taxation has passed under the eye of the most competent authority, the Auditor of the Court of Session. There is a long, but not too long, Appendix of Statutes, Acts of Sederunt, and Office Rules. The work has had the benefit of careful revision, as may be seen from the list of *addenda et corrigenda* in both volumes. A few slips which we had observed to have passed uncorrected in the first volume are now set right in the second. The index is a model of clearness.

In his preface to the first volume Mr Mackay was at pains to show that, in spite of a shrinking roll, it was worth while to write an elaborate work on the Practice of the Court of Session at the close of a session which had been the most inclement outwardly, and the most barren internally, within the memory of the oldest *habitué* of the Parliament House. We wonder what he thinks now of the vitality of the Court. It is some consolation to disappointed practitioners that the times are bad everywhere, and that Mr. Mackay has not retracted in his second volume the hopeful words with which he ushered in the first. We can heartily recommend the work to the profession.

Copyright and Patents for Inventions. By R. A. MACFIE of Dreghorn, F.R.S.E. Vol. I. T. & T. Clark. 1879.

MR. MACFIE, who has for several years studied the effects produced by the laws relating to copyright and patents, and is thoroughly convinced of their mischievous tendency, has in this volume brought together a great mass of material upon the first of these subjects, which will prove of great value alike to the opponents and to the defenders of the present system. Quotations from articles of very various merit, historical notices of the legislation on copyright, and opinions of well-known and unknown men, as well as numerous practical suggestions, are to be found here side by side with a very useful selection from the evidence given before the Copyright Commission.

Mr. Macfie's views, shortly stated, are—(1) that authors have no natural right to copyright; (2) that the high prices of books are the direct consequence of copyright; and (3) that a payment by way of royalty, under which any publisher would be allowed to republish a book, after the first edition was exhausted, on payment of a royalty or percentage to the author or his assignee. An author, he contends, has no property in the result of his labours, and in support of this theory quotes many definitions of property, and from their inapplicability to literary work, draws the conclusion that authors have no claim to protection. It is quite true that property in land and in money differs from the property which the law recognises in a book; but it is matter merely of common justice that a man should be protected in the enjoyment of the result of his labours. The arguments of the opponents of copyright are not unlike those which were influential during the dark ages in preventing the accumulation of wealth by prohibiting the taking of interest. It was argued that a lender had no right to get interest for the loan of his superfluous gold which he could not use, and that as gold did not produce gold it was unnatural to take interest. The world has outgrown these notions, and is not likely to return to the barbarous state of the law in which the taking of interest was unlawful. It would be almost as retrograde a step now to deny copyright to authors on the plea that it is not a natural right but one depending on statutes. We rather fancy that Mr. Macfie, like many of those whose opinions he quotes, has been misled by the failure of the common law of England to protect authors' rights, into drawing the conclusion that therefore they have no natural right. Statute law to a large extent is directed to providing remedies and securing rights where the common law was unable to adapt itself to the changes and progress of modern life. As to the second of his propositions, we think it doubtful whether copyright really tends to the enhancement of the price of books. The payment to the author in the majority of books forms a small

portion of the expense, while a much larger part generally consists of publisher's profits, which are high because his risks are great. But this volume will do good service if it persuade publishers that in many cases it would be more for their advantage to charge lower prices, and thereby to secure a larger sale, and ultimately larger profits. If to the present risks were added the danger of rival editions, the publisher's profits would require to be increased to meet this extra risk. The proposal to substitute, at least to some extent, a royalty for the exclusive right of publication is spoken of favourably by many authorities; but the practical difficulties in the way of working it out, and in preventing evasion, are so numerous and so serious that it will be almost impossible to persuade authors, and their powerful friends in Parliament and the press, that the system would work to their advantage.

Some interesting information on the rights of the Advocates' Library to demand a copy of every work entered at Stationers' Hall is to be found at pp. 134, 145, and 223, from which it may be gathered that the useful privilege of the libraries is by no means so burdensome to publishers as they represent. This volume, though, as its author remarks, not a book to be read through, contains so much that is useful, and so many suggestions upon the subject of copyright from different points of view, that we have no doubt it will be consulted by those who are anxious to form a sound opinion upon the questions discussed in it.

The Month.

Unauthorized Agents.—We have previously directed attention to the conduct of law business by persons who have no legal qualification. Some curious evidence was elicited the other day in the Paisley Bankruptcy Court from a precocious youth of twenty-five who confessed to having been himself twice bankrupt, and who endeavoured to employ his talents by attempting to arrange the affairs of another bankrupt. The newspapers report the case as follows:—

"At the Paisley Bankruptcy Court, before Sheriff Cowan, the adjourned examination in the bankruptcy of John Hendrie, grocer, Pollockshaws, took place in presence of Mr. James M'Lay, accountant, Glasgow, trustee; and Mr. John Campbell, writer, Pollockshaws, law agent in the sequestration. The diet had been adjourned for the purpose of permitting of the examination of a person named John Robertson, describing himself as an accountant in Glasgow. He deponed that he was twenty-five years of age. The bankrupt Hendrie had executed a trust-deed in his favour shortly before his sequestration on 23rd May. That deed was in process before the Lord Ordinary in the Court of Session, having been produced in the petition for the recall of the sequestration.

He had first introduced himself to bankrupt a few days before he granted the trust-deed. He had heard he was in difficulties by knowing a few parties to whom he was indebted. He met bankrupt on the road between Thornhill and Pollockshaws, and explained to him who he was; and he then told bankrupt that he would either purchase his debts or carry through an arrangement with his creditors. The next day the two went to Paisley, and witness inquired at the Sheriff-Clerk's office if anything could be done in the way of keeping bankrupt's name out of the *Black List*, in connection with an action taken against him by a Glasgow firm, and he found that nothing could be done. He denied positively that bankrupt had given him any money, and particularly 30s., for that purpose. The next day witness asked the bankrupt to sign a trust-deed in his favour, and he did so, none of the creditors having been consulted. He then told bankrupt that he meant to call a meeting of his creditors on the following Monday, the 26th May, in order that he might make an offer of composition; but that meeting was never called, because the bankrupt's father and brother declined to become security for any composition. He then advertised bankrupt's goods for sale, and sold them on the 28th May. He took no inventory of the goods before the sale, and at the sale the quantities of goods were not specified. The proceeds of the sale amounted to £50, 11s., which he still held in trust. This amount, however, did not extinguish his claim for work done for the estate, which amounted to £53, 3s. 6d. Witness admitted that he had been twice a bankrupt—in October 1877 and November 1878—and was at present undischarged. This closed the examination of witness, and the further examination of the bankrupt was adjourned."

An Amateur Solicitor.—On Thursday the 10th July the case of *Smith and Jardine* v. *Newman* was heard before Mr. Commissioner Kerr in the City of London Court. This was an action for recovery of damages in a running-down case. The plaintiffs are manufacturers in Paternoster Square, and the defendant, Mr. Wm. Newman, omnibus proprietor, Bloomfield Terrace, Shepherd's Bush. Mr. J. W. S. Miles was solicitor for the plaintiffs. Mr. Henry Weedon, the plaintiff's traveller, said that about ten o'clock in the morning of the 1st April last he was in his employers' commercial trap, which was driven along Newgate Street in the direction of Cheapside. In consequence of the pressure of traffic there was a block, and the trap was the last in the line of vehicles which were standing still. The defendant's omnibus came along at a sharp rate, and ran into the van, the back panel of which on the near side it broke, and did other damage to it. A sum of two guineas was paid to a coachbuilder to make the necessary repairs. In cross-examination by a gentleman in the solicitor's seat, and who it was supposed was a member of the profession retained for the defendant, the witness said that the accident was caused through carelessness on the part of the defendant's driver. It occurred near the General Post Office. The driver of the trap, Charles Williams, gave corroborative evidence. He said he was on his near side, and that

the 'bus was going at the rate of seven or eight miles an hour. His Honour: "Seven or eight miles an hour in Newgate Street when it is blocked up by traffic! I can scarcely believe that. Surely you must be mistaken." The person who appeared for the defendant said his case was that the omnibus was following the line of vehicles, of which plaintiffs' was last, and when the block occurred and the traffic was stopped the van suddenly backed out and came in contact with the 'bus, causing the damage. Two gentlemen who were riding outside on the 'bus and witnessed the accident, confirmed this statement. His Honour found a verdict for the defendant, whose representative asked for costs. The registrar (Mr. Speechley): "Are you the defendant's solicitor?" Answer: "I am not." His Honour: "Who or what are you, then?" Answer: "I am the defendant's 'bus conductor." (A laugh.) His Honour: "If I had known that I should not have heard you. You have practised an imposition on the Court—first, by occupying a place in the seat assigned for solicitors; and secondly, by making speeches and asking questions, and leading us to believe you were a proper qualified member of the profession. Although you are well dressed I might have judged from your occasional lapses of grammar that you were not what you either intentionally or otherwise represented yourself to be. However, I am not surprised. In my early days attorneys used to dress as gentlemen, but nowadays, from their peculiar style of garments, it is hard to distinguish between a solicitor and a Scottish terrier. (Laughter.) I shall certainly not allow the defendant any costs in this case. The idea of his sending one of his 'bus conductors to conduct his defence and simulate the part of a solicitor! I really do not know what we shall have next."—*Law Times.*

Irish Judicial Wit.—In a recent case before the Exchequer Division of the Irish High Court, on counsel attempting to cite a Scottish case, in which an order to serve a writ out of the jurisdiction was refused, on the ground that there was no allegation in the affidavit that the action could be better tried in England, Mr. Baron Dowse is reported to have said, "That is quite a different thing. Scotland is a foreign country for us. We can take no judicial cognizance of Scottish law any more than the laws of the Fiji Islands. There might have been in that case a court sitting on the Ayrshire hills that would have tried the case for half-a-crown."

It has been said that it takes a surgical operation to get a joke into the head of a Scotsman. We must confess that if the above remark is intended as a joke we fail to see its point. If on the other hand it was said in earnest, it was simply stupid and rude. The Irish Bench used to be famous for the brilliancy of its wit, but if this is what it has degenerated to in modern times, it must have sadly fallen off. We believe we could beat it in Scotland—even Lord Young could do better.

VACATION ARRANGEMENTS.

Box-Days.—The Lords have appointed THURSDAY, 21st August, and THURSDAY, 18th September, to be the Box-days in the ensuing vacation.

THE LORD ORDINARY ON THE BILLS will sit in Court on WEDNESDAY, 27th August, and WEDNESDAY, 24th September, each day at eleven o'clock, for the disposal of motions and other business falling under the 93rd section of the "Court of Session Act, 1868;" and rolls will be taken up on MONDAY, 25th August, and MONDAY, 22nd September, between the hours of eleven and twelve o'clock.

Bill-Chamber Rotation of Judges.—The following is the roster for the ensuing vacation:—

Monday,	July 21, to Saturday,	July 26	—Lord	CURRIEHILL.
„	July 28, to „	Aug. 9	„	ORMIDALE.
„	Aug. 11, to „	Aug. 23	„	GIFFORD.
„	Aug. 25, to „	Sept. 6	„	SHAND.
„	Sept. 8, to „	Sept. 20	„	RUTHERFURD CLARK.
„	Sept. 22, to „	Oct. 4	„	CURRIEHILL.
„	Oct. 6, to meeting of Court		„	ORMIDALE.

Autumn Circuits.—The following are the final arrangements for the Courts to be held during the ensuing circuit:—

SOUTH.—The Lord MONCREIFF (Lord Justice-Clerk) and Lord CRAIGHILL.
Dumfries—Tuesday, 23rd September, at twelve o'clock noon.
Ayr—Thursday, 25th September, at twelve o'clock noon.
Jedburgh—Thursday, 2nd October, at twelve o'clock noon.
ALEXANDER BLAIR, Esq., Advocate-Depute.
J. M. M'COSH, Clerk.

WEST.—Lords DEAS and MURE.
Stirling—Thursday, 4th September, at eleven o'clock.
Glasgow—Tuesday, 9th September.
Inverary—Wednesday, 17th September.
ROGER MONTGOMERIE, Esq., Advocate-Depute.
WILLIAM HAMILTON BELL, Clerk.

NORTH.—Lords YOUNG and ADAM.
Aberdeen—Tuesday, 2nd September, at eleven o'clock.
Inverness—Thursday, 4th September, at eleven o'clock.
Dundee—Tuesday, 9th September, at eleven o'clock.
Perth—Thursday, 11th September, at eleven o'clock.
JOHN BURNETT, Esq., Advocate-Depute.
ÆNEAS MACBEAN, Clerk.

Calls to the Bar.—The following gentlemen have passed their private and public examinations and have been called to the Bar: WILLIAM JOHN NORBRAY LEDDALL; DAVID JAMES MACKENZIE; ROBERT DOUIE URQUHART; JAMES KENNEDY DONALDSON; JAMES FERGUSON.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF ZETLAND.

Sheriff THOMS and Sheriff-Substitute RAMPINI.

GARRIOCK (INSPECTOR OF LERWICK AND GULBERWICK) *v.* BRUCE (INSPECTOR OF NORTH MAVINE).

Poor Law—Circumstances in which continuity of residential settlement sustained irrespective of long intervals.—The circumstances of this case fully appear from the interlocutors and notes which follow:—

"*Lerwick, 25th March* 1879.—The Sheriff-Substitute having heard parties' procurators, made avizandum, and considered the closed record, proof, productions, and whole process: Finds (1) that the pauper, Margaret Ratter, resided continuously in the parish of Lerwick and Gulberwick for five years preceding the 14th day of February 1874, the date on which she became chargeable to the said parish; and (2) that the defender is not liable to the pursuer as concluded for in the action: Therefore refuses the prayer of the petition and assoilzies the defender therefrom: Finds the defender entitled to expenses, allows an account thereof to be lodged in process, and remits the same when lodged to the Auditor of Court to tax and report: Finds the pursuer entitled to payment of the sum of £4, 14s. 2d. of the expenses consigned by the defender on 8th January last, and to deduction of that sum from the expenses found due to the defender; and finds the defender entitled to payment of 5s. 10d., being the balance of the expenses consigned as aforesaid, and decerns.

"CHARLES RAMPINI.

"*Note.*—The defender was not asked to lead in the proof, but the *onus* of establishing a residential settlement lies with him. The matter is a simple one of fact, and, although the pauper subsequently became lunatic, is not complicated by any questions as to her mental condition during the period of her inhabitancy of Lerwick. The general effect of the evidence is at first sight to establish by an almost overwhelming *consensus* of testimony a continuous residential settlement in Lerwick for nearly twenty years preceding the date of her chargeability. But in examining the evidence with that minuteness of detail which is necessary in all poor-law cases of this description, the case ceases to be so simple as at the first glance appeared, and questions of some nicety as to the sufficiency of the evidence adduced of the statutory five years' residence arise in consequence of the paucity in the testimony of the witnesses of specific dates between the *terminus a quo* and the *terminus ad quem.*

"But before proceeding to analyze the evidence on this point the Sheriff-Substitute thinks it is proved that shortly before her sister's marriage in 1855, Margaret Ratter left Fail *nunquam animo revertendi*; that she intended to make, and in point of fact made, Lerwick her home from that date; and that she never thereafter left it except during the period of one year, about 1857 or 1858, when she went south for her health, and on three other occasions when she paid short visits to her friends in North Mavine, of which the last, and probably the longest, in January 1870 or 1871, while she was in all likelihood living with

Barbara Mouat, did not extend beyond a few weeks, although Catherine Mouat speaks of it as having lasted three months.

"Between February 1869 and February 1874 the evidence as to residence is—

"(1.) The books of Mr. Joseph Leask, with whose shop she dealt (Evidence of A. B. Jamieson). The account began 7th December 1868, and ran on continuously till 6th June 1871. It was not again operated upon till 11th August 1871. Between 2nd September 1871 and 19th October 1872 there was an interval of thirteen months. From that time it was operated upon at intervals till February 1874.

"(2.) The books of George Irvine, with whom she also dealt (Evidence of Elizabeth Williamson). The account, which was opened in the name of Margaret Ratter, Fail, North Mavine, begins in April 1862. There are no transactions in 1869, only one in 1870, three in 1871, none in 1872, two in 1873, and five in 1874.

"(3.) The books of the Union Bank (Evidence of Alexander Mitchell). On 13th December 1864 a deposit receipt was issued in name of Margaret Ratter, Hillhead, Lerwick. It was operated upon and renewed in same name and address in June and December 1868, in December 1869, in August 1871, and in November 1873.

"(4.) The evidence of Barbara Mouat. Margaret Ratter lived with this woman during the greater part of 1870 and for six months after February 1871.

"During the whole of 1869, then, she was continuously operating on her account with Mr. Leask. In 1870 she lived with Mrs. Barbara Mouat and operated continuously on her account with Mr. Leask. Up to August 1871 she also lived with her and operated on her deposit receipt with the Union Bank, and up to 17th of that month on her account with Mr. Irvine.

"We have no specific information as to what became of her from August or September 1871 to October 1872, a period of thirteen or fourteen months. From October 1872 to 24th June 1873 she dealt with Mr. Leask. We cannot trace her between June and November 1873, a period of about four months. But she operated in that month on her accounts with the Union Bank, Mr. Irvine, and Mr. Leask; and in December 1873 on her accounts with Mr. Leask and Mr. Irvine. In January and February 1874 she had transactions both with Mr. Leask and Mr. Irvine.

"The defender was bound to fill up these blanks of fourteen and four months respectively if he could. He has done so by the evidence of persons who had known her during her residence in Lerwick down to the time of her removal to Montrose Asylum. Many of these witnesses were the persons with whom she had lived, and though this evidence is vague and unsatisfactory in the matter of dates, it carries with it a weight which it is impossible to disregard in a case of this kind. On a careful consideration of the whole proof the Sheriff-Substitute thinks that a residential settlement in Lerwick and Gulberwick, sufficient to satisfy the requirements of the statute, has been made out. (Two words deleted.) C. R."

"*Lerwick*, 15th *June* 1879.—The Sheriff having considered the pursuer's appeal, with the reclaiming petition and answers and whole process, dismisses said appeal, and adheres to the interlocutor submitted to review, with additional expenses as the same may be taxed, and decerns. GEO. H. THOMS.

"*Note.*—The Sheriff has arrived at the same result as the Sheriff-Substitute. The principles to be applied in this case are those enumerated in *Mackenzie* v. *Cameron* (10th December 1858, 21 D. 93). That was a case in many of its details very similar to the present. It was there held that occasional absences of weeks or even months at a time in a question between the parish of birth and the parish of residence did not overcome the presumption of continuous residence which otherwise arose on the proof. It was further held in that case that the *onus* of showing where the pauper was during these occasional absences did not lie on the parish of birth. Lerwick and Gulberwick has not discharged this *onus* in the present case, and North Mavine has been therefore assoilzied.

"G. H. T."

Notes of English, American, and Colonial Cases.

SALE OF FOOD AND DRUGS ACT, 1875, ss. 6, 13, 14, 17, and 20.—*To the prejudice of the purchaser—Purchase by officer for analysis.*—Where an inspector duly appointed under section 13 of the Sale of Food and Drugs Act, 1875, purchased for analysis an article of food, and took the proceedings upon such analysis prescribed by the Act, and it was proved that the article so purchased was not of the nature, substance, and quality of the article demanded by him, but an inferior article, though not known by him to be so at the time of the purchase,—*Held*, that it was a "sale to the prejudice of the purchaser" within section 6 of the Act. *Semble*, per Lush, J.—Section 6 is not limited to the case of an admixture of a foreign substance with the article demanded, but may apply where the article supplied is of a different and inferior quality from that demanded. *Davidson* v. *M'Leod*, in the Scotch Court of Justiciary, dissented from.—*Hoyle* v. *Hitchman*, 48 L. J. Rep. M.C. 97.

BILLS OF EXCHANGE.—*Deposit of securities by one of acceptors with bank—Bill discounted by bank for indorsee—Insolvency of acceptors—Right of indorsee to securities—Co-surety—Contribution.*—In the absence of a special contract the law of principal and surety does not apply as between the discounter of and the indorsees and other parties to a bill of exchange in respect of securities pledged by any of such other parties to and held by the discounter for the amount due on the bill of exchange.—*Duncan, Fox, & Co.* v. *North and South Wales Bank* (App.), 48 L. J. Rep. Chanc. 376.

A., a member of a firm, pledged his separate estate to a bank to secure to the bank the balance for the time being owing to the bank from the firm. Afterwards the firm accepted bills of exchange which were indorsed to and discounted for B. by the bank. The firm became bankrupt and the bills were dishonoured at maturity. The bank having demanded of B. payment of the amount due on the bills, B. claimed to be a surety for the firm in respect of the bills, and to be entitled as such surety to the benefit of the securities held by the bank :—*Held*, that B., as indorsee of the bill of exchange, was a principal debtor to the bank and not entitled to any such right of suretyship as he claimed. *Held*, also, that if the law of suretyship could apply, A. and B. were co-sureties for the firm, and that A. had the prior right to require B., as a principal to the bill, to contribute to relieve him.—*Ibid.*

BILL OF LADING.—*Excepted perils—Negligent stowage—Liability of master.*—Plaintiffs shipped a quantity of sugar in bags, to be carried by defendants' steamship from Hamburg to London, at an agreed freight. The vessel was chartered by Messrs. P. & K., plaintiffs having no knowledge of the charter; and the bill of lading which was received by plaintiffs was signed "P. & K., agents." The bill of lading provided that the sugar should be delivered in good order, "the act of God, the Queen's enemies, pirates, robbers, jettison, barratry and collision, fire on board or on shore, and all accidents, loss and damage of whatsoever nature or kind, and however occasioned, from machinery, boilers, steam and steam navigation, or from perils of the sea or rivers, or from any act, neglect, or default whatsoever of the pilot, master, or mariners in navigating the ship; the owners of the ship being in no way liable for any of the consequences of the causes above excepted; and it being agreed that the officers and crew of the vessel in the transmission of the goods as between the shippers, owners, and consignee thereof be considered the servants of such shipper, owner, or consignee." In an action for damage caused by negligent stowage,—*Held*, that the damage done to the sugar was a tortious act, in respect of which plaintiffs could recover from defendants, whether the latter were bound by the bill of lading or not.—*Hayn, Roman, & Co.* v. *Culliford* (App.), 48 L. J. Rep. C.P. 372.

BOTTOMRY BOND.—*Premature arrest of ship—Liability to pay damages and costs.*—When a bottomry bond or ship and freight is payable at or before the expiration of seven days after the arrival of a ship in port, and the ship is arrested at the suit of a holder of the bond immediately on its arrival, he will have to pay the costs consequent upon such arrest, if the money was ready to be paid on the arrival of the ship.—*The Endaor*, 48 L. J. Rep. P., D. & A. 32.

PHARMACY ACT.—*Sale of poisons by unqualified persons—Application of statute to corporations—Action for penalties.*—By 31 and 32 Vict. c. 121, s. 1, it is enacted that "it shall be unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding of poisons, unless such person shall be a pharmaceutical chemist or a chemist or druggist within the meaning of this Act." By section 15 a penalty is imposed on "any person" for selling poisons or keeping open shop for the sale of poisons in contravention of the Act. Defendants were a limited company registered in 1878 under the Companies Acts, and formed for the purpose of purchasing and acquiring the trade of a wholesale and retail grocer and general warehouseman then carried on by M. The business of the company included, amongst other departments for the sale of various goods, a drug department, which was an open shop for the retailing, dispensing, and compounding poisons within the meaning of 31 and 32 Vict. c. 121. The business of this particular department was conducted by L., with the aid of two qualified assistants. L. was a pharmaceutical chemist or a chemist and druggist, and was also a shareholder, but he acted as a servant of the company and was paid a salary or wages. Neither the managing director or any other shareholder were qualified to sell poisons:—*Held*, that defendant company was included under the term "person," and was liable accordingly to a penalty under 31 and 32 Vict. c. 121, for having sold poisons and kept open shop for the sale of poisons in contravention of that Act.—*The Pharmaceutical Society* v. *The London and Provincial Supply Association* (*Lim.*), 48 L. J. Rep. Q. B. 387.

COLLISION.—*Compulsory pilotage—Burden of proof.*—In an action for damage by collision as soon as the defendants have shown that a pilot whose employment was compulsory was on board the wrong-doing vessel and that his orders were obeyed, the burden of proving that negligence arising from the act of some other person is a cause which contributed to the collision rests on the plaintiff, even though the defendants have only given the testimony of the pilot as evidence.—*The Marathon*, 48 L. J. Rep. P., D. & A. 17.

PARTNERSHIP.—*Contribution of copartners—Negligence of managing partner —Arbitration.*—The managing partner of a colliery worked beyond the boundaries of the colliery without proper inquiry as to such boundaries, and, after notice from the adjoining owner that he was committing a trespass, recklessly continued such workings without consulting his copartners under the *bona-fide* belief that the adjoining owner had no title to the disputed area. An action against him for trespass and damages by the adjoining owner was referred to arbitration. The copartners had no knowledge of the action until after the reference had been agreed to. They attended the reference, however, and did not object to it. The arbitrator found that a trespass had been committed, and assessed the damages at £6000. The copartners refusing to contribute, the managing partner brought an action against them claiming a declaration that the £6000 damages was a partnership debt, and that defendants were bound to contribute rateably to it:—*Held*, that the copartners had acquiesced in the arbitration, and were bound by the award, which was equivalent to a verdict by a jury and the judgment of the Court thereon.—*Thomas* v. *Atherton* (App.), 48 L. J. Rep. Chanc. 370.

But *held*, that, inasmuch as the managing partner had acted with culpable negligence in continuing to work in the disputed area after notice from the adjoining proprietor, and without consulting his copartners, he alone was liable for the damages.—*Ibid.*

PAUPER LUNATIC.—*Derivative settlement—Divided Parishes Act—Order of removal.*—A pauper born in 1840 in the appellant union, had never acquired a settlement in her own right. The pauper's father was born in the L. union, and he had never acquired a settlement elsewhere:—*Held* (following the decision in *The Guardians of the Westbury Union* v. *The Overseers of Barrow-in-Furness*, 47 L. J. Rep. M. C. 79), that the 35th section of 39 and 40 Vict. c. 61 was retrospective in its operation, and that therefore the pauper at the age of sixteen acquired her father's settlement, which was a birth settlement, and could be ascertained without inquiry into his derivative settlement.—*The Guardians of the Hereford Union* v. *The Guardians of the Warwick Union*, 48 L. J. Rep. M. C. 111.

MASTER AND SERVANT.—*Loss of service—Servant passenger—Negligence of railway company—Damages to master.*—A master cannot maintain an action *per quod servitium amisit* against a railway company for an injury to his servant whilst a passenger on the company's railway, caused by neglect of their duty to carry safely the servant according to their contract with him as such passenger, unless the master was a party to the contract. But where the servant is injured by the negligence of another railway company, not party to the contract, in running their train against the train in which the servant is such passenger, the master can maintain an action *quod servitium amisit* against such other company.—*Berringer* v. *The Great Eastern Railway Company*, 48 L. J. Rep. C. P. 400.

JUDICIAL SEPARATION.—*Wife's costs and alimony—Sequestration of civil servant's pension.*—A decree of judicial separation was pronounced on the petition of the wife. The respondent was a retired officer of the Court of Queen's Bench, and was in the receipt of a pension for past services. He had failed to pay the petitioner's costs of suit or the alimony allotted to her, and was resident out of the jurisdiction. The Court, holding that the pension was liable to sequestration, ordered that it should stand charged with the petitioner's costs and alimony, that it might be received by her or her trustee, and that the respondent be restrained from receiving it either personally or through his agent.—*Sansom* v. *Sansom*, 48 L. J. Rep. P., D. & A. 25.

JURISDICTION.—*Ship belonging to foreign government and engaged in international postal service—Immunity from arrest.*—A packet engaged in international postal service and chartered by a foreign government, officered by the duly commissioned officers of that government, and also allowed to carry small packages, is not free from the process of an English municipal tribunal. Nor can a convention between Great Britain and Belgium, not ratified by Parliament, take away from a British subject his right to enforce a legal process against a foreign ship.—*The "Parlement Balæ,"* 48 L. J. Rep. P., D. & A. 18.

COINING.—*Uttering counterfeit coin.*—24 and 25 Vict. c. 99, s. 9, enacts that "whosoever shall tender, utter, or put off any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall be guilty of a misdemeanour." The prisoner uttered two coins which were or had been real sovereigns, coined at the Mint, but they had been fraudulently filed at the edges to such an extent as to reduce the weight by one twenty-fourth part. The effect of the filing was to remove the milling entirely, or almost entirely. In order to restore the appearance of the coins, a new milling had been made on each coin with tools:—*Held*, per Lord Coleridge, Pollock, B., and Huddleston, B. (*dissentientibus* Lush, J., and Stephen, J.), that the coins were false and counterfeit within the meaning of the statute.—*The Queen* v. *Hermann*, 48 L. J. Rep. M. C. 106.

AGENT.—*Personal liability of agent signing in his own name—Charter-party.*—The defendants signed in their own name, without qualifying their signature, a charter-party purporting in the body to be made by them "as agents for charterers:"—*Held*, that the defendants were personally liable upon the charter-party.—*Hough & Co.* v. *Manzanos & Co.*, 48 L. J. Rep. Exch. 398.

CHARTER-PARTY.—*Demurrage—"Cargo to be discharged with all despatch, according to the custom of the port."*—Under a charter-party, which provides that the cargo is to be discharged with all despatch, according to the custom of the port, but which does not otherwise specify the time to be occupied in the discharge, the duty of the charterer is to use reasonable diligence in performing that part of the delivery which falls upon him according to the custom of the port, but he is not bound to take measures to obviate delays which may arise, owing to the custom of unloading at the port, without his act or default. So held by Brett, L.J., and Thesiger, L.J. (*dissentiente* Cotton, L.J.).—*Postlethwaite* v. *Freeland* (App.), 48 L. J. Rep. Exch. 353.

HIGHWAY ACT.—*Furious driving of carriage along highway—Bicycle.*—A bicycle is a "carriage," and the propulsion of it by means of a person seated on and carried by it is a "driving of a carriage" within 5 and 6 Will. IV. c. 50, s. 78.—*Taylor* v. *Goodwin*, 48 L. J. Rep. M. C. 104.

ARBITRATION.—*Remitting back award for reconsideration.*—The reference to arbitration of a question of disputed compensation, pursuant to section 180 of the Public Health Act, 1875, is a submission to arbitration by consent, within the meaning of the Common Law Procedure Act, 1854, and the Court has a discretionary power, under section 8 of that Act, "at any time" to remit the award back to the reconsideration of the arbitrator. The Court, however, in the exercise of its discretion, took into consideration the lapse of time between the making of the award and the application to remit, and refused the order to remit on the ground, amongst others, that it was too late. *Kellett* v. *The Local Board of Tranmere* (34 L. J. Rep. Q. B. 87), dissented from.—*Warburton* v. *The Haslingden Local Board*, 48 L. J. Rep. C. P. 451.

PARTNERSHIP.—*Carried on in the name of an individual member—Bill of exchange—Liability of dormant partners—Onus of proof.*—Where a partnership is carried on in the name of an individual member of it, any note or other obligation signed by such individual member in his name is *prima facie* presumed to be the note of the individual and not of the partnership. Plaintiffs sued the defendants, Beatson & Mycock, on two bills of exchange: one drawn by K. on W., and indorsed "William Beatson;" the other drawn by C., addressed to "Mr. William Beatson, Chemical Works, Rotherham," and accepted and indorsed "William Beatson." Before January 1878 Beatson had carried on the business of a chemical manufacturer at Rotherham. On the 1st of January the two defendants entered into a partnership in the same business, on the terms that the style of the firm was to be "William Beatson," that Beatson was to have the whole management of the business, and that neither partner should have authority to draw, indorse, or accept bills without the previous consent, in writing, of the other. Beatson had kept an account at the Rotherham bank for several years: after the formation of the partnership, no change was made either in the heading of the account at this bank, or in the method of keeping it. It was headed "William Beatson, Esq." The firm had no separate account. The bills sued on were dated respectively the 6th and 13th of March 1878, and were renewals of earlier bills, originating in accommodation transactions, between Beatson and C., K., and W. The bills were indorsed and accepted by Beatson without the knowledge of Mycock. The proceeds of the bills went into the account at the Rotherham bank, and Beatson drew on this account from time to time for goods supplied to the business, but his account with the bank was overdrawn; and he had drawn out of the account, for his own purposes, a much larger sum than was brought into the account by the proceeds of the bills in question. The plaintiffs, who had discounted the bills on the 14th and 18th of March respectively, never heard of the existence of any partnership until four months afterwards, and knew nothing of Mycock till then:—*Held*, that Mycock was not liable on the bills as dormant partner.—*The Yorkshire Banking Company* v. *Beatson & Mycock*, 48 L. J. Rep. C. P. 428.

FACTORY.—*Education of children employed in—Bye-laws of school board compelling attendance.*—The proviso in section 74 of the Elementary Education Act, 1870, precludes a school board from using its power so as to interfere with the arrangements already made by the Factory Acts. A school board is, therefore, not entitled to enforce its bye-laws as to the hours of attendance by children against a child who, though not obeying such bye-laws, is attending an efficient elementary school pursuant to the Factory Acts.—*Mellor* v. *Denham*, 48 L. J. Rep. M. C. 113.

MARINE INSURANCE.—*Reinsurance against fire—Declarations of risk—Usage of underwriters.*—In accordance with an agreement entered into between the plaintiffs, a marine insurance company, and the defendants, a fire insurance company, the defendants subscribed a policy whereby they undertook to reinsure the plaintiffs against loss or damage by fire to the extent of £50,000, by the ships as might be declared at and from certain ports to destination, the policy to be subject to the same conditions (as far as they related to the fire risk only) as the original policy or policies, and would pay as might be paid thereon. The policy provided that the arrangement was to be in force for one year from the 1st of October 1876, and to include only such vessels as were coal-laden; the policy to be supplemented by further policies on like terms should the amount thereof not prove sufficient for the year's transactions. This policy becoming exhausted by declaration of risk, the defendants, on the 9th of July, subscribed a second policy similar in terms to the former policy, and this second policy becoming likewise exhausted, a third policy was, on the 25th of October, subscribed by the defendants, similar in terms to the former policies. On the 7th of June the plaintiffs insured a coal-laden ship, the Hampden, and there was a loss by fire of the cargo on the 18th of September, which would have been covered by the policy of insurance if the risk had been duly declared, but through the negligence of the plaintiffs' manager the risk had not been declared. At the time the third policy was effected the plaintiffs knew of the loss, and on the 2nd of November they declared the Hampden and claimed for a loss. The plaintiffs having brought an action to recover the loss, it was—*Held*, that the plaintiffs were entitled to recover, for that the defendants were insurers in respect of a marine risk, and as such subject to the usage of underwriters, stated in *Stephens* v. *The Australasian Insurance Company*, by which, in the case of open policies on ships to be declared, the policy attaches to the goods as soon as, and in the order in which they are shipped, in which order the assured is bound to declare them, and in case of mistake as to the order of shipment, the assured is bound to rectify the declaration, which may, in the absence of fraud, be altered even after the loss is known. —*The Imperial Marine Insurance Co.* v. *The Fire Insurance Corporation (Lim.)*, 48 L. J. Rep. C. P. 424.

PILOTAGE, COMPULSORY.—*River Thames.*—Pilotage is compulsory on a vessel belonging to the port of London within the river Thames, in consequence of the provisions of the Merchant Shipping Act, 1854, s. 353. *The Killarney* (Lush. 427; s. c. 30 L. J. Rep. P., M. & A. 41) followed.—*The Hankow*, P., D. & A. 29.

PUBLIC HEALTH ACT.—*Paving private streets—Recovery of expense from owners—"Owner in default."*—Where an owner of premises having received a notice from the urban sanitary authority under section 150 of the Public Health Act, 1875, to pave, etc., the street adjoining his premises, fails to comply with the same, and afterwards the local authority execute the works, but after the work has been begun by the local board and before completion of it, the owner sells the premises, he ceases upon such sale to be an "owner in default," and cannot be ordered to pay the expenses incurred by the local authority in executing the works; such expenses being by section 257 of the same Act recoverable only from the person who is "owner of the premises when the works are completed."—*The Queen* v. *The Swindon New Town Local Board*, 48 L. J. Rep. M. C. 119.

RAILWAY COMPANY.—*Statutory powers—Letting rolling stock—Ultra vires—Injunction—Interlocutory application—Final judgment—Time for appealing.*—The lines of the T. Railway Company communicated with the lines of the E. and of the B. Railway Companies, and the only access of the T. Company to London was by and over the lines of the other two companies. In 1854 the T. Company leased their undertaking for twenty-one years to P. & Co., who entered into an agreement with the E. Company, under which the E. Company supplied them with locomotives and rolling stock to work the T. line. In 1863 an Act was passed "to authorize arrangements between the T. Company, and the lessees of their undertaking, and the E. and B. Companies, with reference to the lease and working of the T. Railway, and for other purposes," which empowered the E. and B. Companies jointly or severally to take a lease, or a transfer of the existing lease, of the T. line; and also empowered them to enter into agreements with respect to the working of the T. line, and with respect to the apportionment of the traffic, and of the toll and fares; and also empowered them and the T. Company to enter into any contracts or agreements for effecting all or any of the purposes of the Act, or any objects incidental to the execution thereof. On the expiration of the lease in 1875 the E. Company, which in the meantime had, by amalgamation with the B. Company, become the G. Company, and had during the lease continued to supply P. & Co. with locomotives and rolling stock, entered into a deed of arrangement with the T. Company, under which the G. Company undertook to supply the T. Company with locomotives and rolling stock to work the traffic of the T. line, upon certain terms. An action having been brought by the Attorney-General, on the relation of certain manufacturers, against the G. Company, to restrain them from letting locomotives and rolling stock, the Master of the Rolls, being of opinion that the G. Company had no statutory or other powers to enter into the deed of arrangement, and that the same was *ultra vires* on their part, granted a perpetual injunction against them in the terms asked for. On appeal,—*Held, per* James, L.J., and Bramwell, L.J. (*dissentiente* Baggallay, L.J.), that the G. Company had power not only under the special Act of 1863, but also under the 87th section of the Railways Clauses Consolidation Act, 1845, to enter into the deed of arrangement; and further, that, even if the arrangement were *ultra vires*, there was no such injury to or interference with the rights of the public as called for the interference of the Court. *Held* also, *per* James, L.J., and Bramwell, L.J. (*dissentiente* Baggallay, L.J.), that the mere fact that the corporation is acting *ultra vires* does not warrant a suit on behalf of the Sovereign or the public to stop the act complained of, unless it is shown that some plain and substantial public mischief is being done. *Held, per* Baggallay, L.J., that the decision of the Master of the Rolls was right and ought to be affirmed, and that, whenever a corporation exceed their statutory powers, and thereby transgress the law, it is the duty of the Attorney-General, in the interests of the public, to take the necessary steps to enforce the observance of the law.—*The Attorney-General* v. *The Great Eastern Railway Company* (App.), 48 L. J. Rep. Chanc. 428.

When, on motion for judgment, under Order XL. rule 11, upon the admission of fact in the pleadings an order is made which, though interlocutory, amounts to final judgment, so that no further proceedings in the action are necessary, such order is appealable within a year.—*Ibid.*

PRISON COMMISSIONERS.—*Boy sent after imprisonment to reformatory—Expense of supplying proper clothing for reformatory.*—The expense of providing a youthful offender sentenced to be detained, after a term of imprisonment, in a reformatory, with suitable clothing for admission to such reformatory, is an expense incurred for "the maintenance of a prisoner," for which the Prison Commissioners are responsible, under the Prisons Act, 1877.—*The Prison Commissioners* v. *The Corporation of Liverpool*, 47 L. J. Rep. Q. B. 436.

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GENERAL AVERAGE.

A RECENT decision of the Queen's Bench Division dealing with a long-continued usage of English average-adjusters, in which they differed from the laws and practice of many of the maritime states of Europe and America, deserves the attention of merchants and underwriters, whose interests are unfavourably affected. Where a ship, in consequence of damage either sustained by the violence of the elements or voluntarily incurred in order to secure the safety of ship and cargo, put into port to refit, British average-adjusters have for many years adjusted average states. upon the footing that the expense of putting into port and of discharging the cargo was general average, but that the expense of storage was particular average upon the cargo, while the expense of reloading and the various charges incurred by the ship in leaving port were particular average upon the freight. Recently doubts arose in the mind of an average-adjuster as to whether this practice was right, and he formed the opinion, upon which he acted, that the correct course was to allow as general average all charges connected with the leaving of port, as well as for the storage and reloading of the cargo, in a case where it had been discharged in order to permit of the repairs being proceeded with. This alteration in the practice was challenged by the defendants in the case of *Atwood* v. *Sellar & Co.* (4 Q. B. Div. 342), which was brought by the shipowner to recover £13, 14s. 9d., which the average-adjuster had stated in accordance with his changed opinion. The question was discussed in the Queen's Bench Division before Chief-Justice Cockburn and Justices Mellor and Manisty, upon a special case, stating the facts, and the above-mentioned practice of English average-adjusters.

The Court was divided in opinion. Justice Manisty, proceeding partly on the practice and partly on principle, held that the shipowner's claim was unfounded, and that the rule of English practice was just and in accordance with law; while Chief-Justice Cockburn,

in whose opinion Justice Mellor concurred, disregarded the practice, and laid down the rule that such charges were general average charges.

There are two cases in which such a claim may arise—first, where the putting into port has been necessitated by the cutting away of a mast or making some other sacrifice for the common benefit; or second, where, after the ship has been injured by the winds and waves, it has been found necessary, in order to save ship and cargo, to put into port. In the first case, the expense of repairing is general average, for the shipowner's sacrifice was made for the benefit of all and must therefore be made up by all; in the second case, the shipowner pays the expense of repairs himself, because the loss is involuntary. In both cases the expense of putting into port is general average, because it falls within the definition of general average stated by Justice Lawrence in *Birkley* v. *Presgrave* (1 East. 228), viz. "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionably by all who are interested." In the same way the expense of discharging the cargo, where that is necessary to allow of the repairs being made, is general average, because the ship cannot be saved from the peril in which it stands unless the cargo be removed, nor can the cargo be preserved if it be not taken from the hold of an unseaworthy vessel. So far ship and cargo are involved in a common peril, from which the extraordinary act of discharging the cargo saves both. The difficulty and the difference of opinion arise at the next step. Where the ship has been repaired and the cargo again put on board, on whom is the expense of storage and of reloading to fall? The principle upon which the majority of the Queen's Bench Division proceeded in affirming the proposition that these charges were general average was thus stated by Chief-Justice Cockburn: "There occurs in the course of a voyage a state of things which is not provided for by the contract. A storm arises, the vessel is in danger, but a port is within reach, in which, in the common interest of all concerned, it would be prudent to take refuge. Or it becomes necessary to cut away a mast, and as the consequence of so doing, to seek an intermediate port in order to replace it. Or the ship sustains damage from the violence of winds or waves, which renders it necessary, for the common safety of ship and cargo, and *for the further prosecution of the adventure*, to seek a port at which repairs which have become necessary for the safe prosecution of the voyage may be effected;" and he then adds, "that in theory a new arrangement, not provided for in the original contract, takes place, . . . under which these expenses, being extraordinary expenses incurred for the common benefit, should be borne in common."

In the words we have italicized Sir Alexander Cockburn has introduced into the definition of general average a new element,

which is not known to the definitions which have hitherto found favour with Courts of law, or been embodied in codes, although it must be admitted that in many countries the rule which he deduces from it has been adopted. In the recent case of *Walthew* v. *Mavrojani* (5 L. R. Ex. 116) it was unsuccessfully argued that the true principle was that so long as the voyage is not abandoned and the goods remain in the care and custody of the shipowners for the purpose of the voyage, although they may not be actually on board, the whole is one common enterprize and adventure, and whatever is done by the shipowner for the purpose of averting a risk which threatens the adventure is done for the common interest of both. But the Court in the Exchamber Chamber declined to recognise this principle, pointing out that if this principle were well founded it would necessarily follow that repairs, though not rendered necessary by a voluntary sacrifice, would be general average; and they held that the expense of getting a stranded ship off after the cargo had been discharged was not general average, because the cargo being in safety, had no further concern with the safety of the ship, notwithstanding that it was ultimately reloaded and forwarded to its destination.

Chief-Justice Cockburn says in *Atwood* v. *Sellar & Co.* that the exclusion of the cost of repairs to the ship from general average rests on exceptional grounds, namely, that the benefit of the repair inures to the owner beyond the scope of the voyage, and that it would therefore be unjust to the goodsowner to make him contribute to the costs. A much simpler ground upon which the expense of repair is refused is that stated by Chief-Justice Bovill in the case already quoted, that the goods being in safety their community of interest with the ship ceases. Besides, if the reason given were the real one, the proper result would be not to deprive the shipowner of all claim for repairs, but merely for so much of their value as remained unexhausted at the end of the voyage.

Logically it is said that coming out of a port is the necessary consequence of going in, but this is not so. It is only probable that the ship will come out again, if she can be repaired. She goes in in order to save herself and the cargo; she comes out as she is repaired in order that she may earn freight and prove a source of profit to her owners. It is matter of indifference to the goods-owner whether his goods are carried forward by one vessel or another, and his goods being in safety, why should he be liable for a part of the expenses the owner incurs in further prosecuting the voyage, or if liable for a part, why should he not be liable for the remaining part, viz. the repairs? It seems to be a logical consequence from the relative rights and obligations which shipowners and goodsowners have when the voyage is interrupted, that the expense of storage should be treated as particular average on the cargo, and the expense of reloading and of leaving port should be treated as particular average upon freight. When a ship has

suffered sea-damage and puts into port the shipowner is not bound to repair. He is absolved from his contract by the accident to this extent, that he is not bound to send forward the cargo in his own ship. He is, however, bound to do the best he can for the cargo if the owner be not on the spot. He may tranship and so earn the freight. He is not bound to tranship, but may insist on carrying on goods in his own ship, although the repairs may take time. If, however, he repairs, he is bound to carry forward the cargo in his ship. On the other hand, the owners of the cargo are not entitled to demand delivery of their goods at the port of refuge, if the master is in course of repairing the ship, unless they tender the full freight.

When a ship arrives damaged in a port of refuge, and discharges all her cargo, the question arises for whose benefit the subsequent expenses are incurred. So far as the expense of storage is concerned there seems to be a loss which falls upon the owner of the cargo, just as any other loss which he may sustain through the prolongation of the voyage; and the cargo being once in safety and the shipowner's obligation to carry it on in his ship ceasing unless he repairs, the storage seems to be in no sense for the benefit of the ship, but solely for the preservation of a cargo. If the owner of the cargo fear that the detention will be excessive, he can have his goods on paying freight; and in extreme cases it may be the duty of the shipmaster at once to tranship, instead of keeping the cargo an undue time in warehouse. The expense of storage is an accident arising from the perils of the seas, and is not a consequence of the general average act. Where a ship has been damaged by a storm the cargo at the same time suffers damage, viz. the liability to detention, and the ship also is liable to detention. The ship with the cargo puts into port. The ship is detained a month while repairs are being effected, and as the expense of the repairs is not general average, neither are the port charges for the use of the dock. It seems equally to follow that the expense of storage is particular average, as being a direct consequence of the violence of the storm, and not incurred for the joint benefit of ship and cargo.

As regards, again, the expense of reloading, the conclusion from the rule that the interruption of the voyage by the injury to the ship leaves the owner of the cargo bound to allow his goods to go on while the shipowner has the option of repairing or not, seems necessarily to be that the reloading is for the benefit of the freight. The shipowner, although not bound to repair, does so with the view of earning his freight. He detains the cargo in warehouse, perhaps contrary to the interest of its owners, in order that he may earn freight, and he reloads in order that he may earn freight. The expense of reloading, then, is a burden which is of the nature of particular average, because it is for the benefit of freight and not of cargo. It is indifferent to the owner whether

his goods be forwarded in the original ship or in another. If he had the option of transhipping, it might be said that the expense of reloading is for his benefit; but he has no such option, and must, according to the practice of English average-adjusters, pay for the storage of his cargo while the ship is being repaired. He cannot avoid the expense of storage, because the shipowner is entitled to say to him that the ship will be repaired and that the goods must wait. In many cases it would be easy, as well as for his direct benefit, to tranship without warehousing; but the shipowner prevents his doing that, and if so the expense of reloading and of leaving port seems to be particular average upon the freight.

While, then, the practice which the Court in *Atwood* v. *Sellar & Co.* disregards is apparently in accordance with strict legal principle, it is important to consider the policy of the rule laid down by the Queen's Bench Division. It is matter of complaint by merchants and underwriters that the average laws of other countries operate injuriously to their interests, because they give shipowners far too great an opportunity in rearing up general average claims, and the modifications proposed by the York and Antwerp rules have been seriously objected to, as increasing the opportunities of fraud. It must be remembered that ships are of great value, and that there is little or no risk of masters abstaining from making proper sacrifices, and from putting into port, when it is really necessary in the interest of the ship as well as of the cargo. In fact, it comparatively rarely happens that the interest of the ship is not uppermost in a captain's mind when he resolves on a general average, and in many cases the ship derives real benefit from a sacrifice of old sails or spars, which are replaced almost entirely at the cost of a valuable cargo. On the other hand, it may be said that it is of importance that the rules relating to average should be the same in all countries, and that merchants and underwriters will accordingly have no doubt as to their liabilities, wherever the question of liability may be settled. If the customs of foreign countries are, however, not merely inconsistent with legal principle, but injurious in point of policy, as we think there are serious grounds for thinking in the present case, the certainty of responsibility is a small and problematical good, only attained at the sacrifice of greater advantages. The rule certainly deserves the serious consideration of the mercantile community.

SHALL WE INTERROGATE THE ACCUSED?

TWO recent English trials for murder, in each of which a female servant was accused of murdering another woman to whose

solitary house she had access, have raised this old question. In the one case the accused escaped by what in Scotland would have been a verdict of "not proven." The London press at once pointed out that justice had failed in getting at the facts, mainly because the only person who knew fully about the facts had not been asked and cross-examined about them. In the other case there was a conviction, and the conviction was followed by a succession of detailed narratives from the condemned cell—all of them sent to the newspapers, and all finally acknowledged to be false. But had her story been uttered and sifted in open Court and before the jury, it would, it is said, have been made at once plain whether it was true or false; and at least the grounds for conviction, if a conviction had followed, would have been plainer than now. And so a general question is revived, which never does more than slumber in Scotland.

The matter came up in the Faculty of Advocates a year ago, on the 15th of March 1878. A committee appointed to consider the subject had divided nearly equally, a narrow majority voting for removing present restrictions; and accordingly the matter was referred to a meeting of Faculty. The result was a twofold vote. In the first, the meeting decided, by twenty-seven to seventeen, that persons accused should be "competent though not compellable to be witnesses." And the saving clause of "not compellable" was apparently modified by a subsequent vote of about two to one (the numbers on both sides, however, being smaller), to the effect that it should be "competent to examine a prisoner as a witness on the motion of the prosecutor." This must mean at least that though you may not compel an accused by ordinary penalties to answer your questions, you may, at the instance of the prosecutor, point out to him that he is called upon and bound to speak, and that his silence will legitimately tell against him. It seems agreed on all hands that this would in any case be the effect on the jury if it were made even competent for the prisoner to tell his own story: *i.e.* the practice contemplated in the second resolution of the Faculty would follow in fact from the legislative adoption of the first. Holding both the one and the other to be expedient, the writer proposes in the present paper to notice some of the objections which crop up in legal literature and in the Parliament House, and no doubt delay the legislative change.

And to deal with objections is the only way in this matter. Ordinarily those who propose a legislative change have to show cause for the alteration. It is not so here. We fall back on what Sheriff Dickson, dealing with this very question, calls "the great general principle—never disputed in the ordinary affairs of life, in investigations in history, literature, science, or philosophy, and now happily recognised in judicial inquiries—that the more light that can be thrown on the question under consideration, and the more various the sources from which that light comes, the more

likely is the judgment to be just."[1] In former times a great deal of light was excluded on the ground that it was not pure light. "Thirty-five years ago exclusion may almost be said to have been the rule and admissibility the exception." Now the general rule is admitted, that we welcome all light *valeat quantum*. The witness may be an interested witness, but that is the ordinary case of refraction of light, for which every sane man makes allowance in daily life, and for which he does not cease to make allowance when he steps into a jury-box. So with the case of the most interested witness of all, a party accused. He knows more about the question than any other; he is at the source of all the light we need upon it. But then, at least in the case when he is guilty, he is under greater temptations than any other witness to deceive, and the light presumably comes to us with a maximum of deliberate refraction. But that is exactly as it ought to be; exactly as in daily life we expect it to be, only in daily life no one thinks of rejecting any light, *valeat quantum*. Take the early stages of a *cause célèbre*, of such a quality as to interest and puzzle intelligent men. The whole city is full of it. A few days before the trial we meet at a dinner-table a friend who has brought with him what is ascertained on good authority to be the story of the prisoner. Does any one refuse to hear it? Those present may refuse to believe the story, in part or in whole, when they have heard it. But they hear it with avidity, because they are trying to get at the truth upon a matter as yet doubtful. And they all feel instinctively that for this purpose a story, even a false story, by the person who knows all about the doubtful matter, is a gain, being taken for what it is worth. Now there is no great difference between fifteen men round a table and fifteen men in a box. The latter also are supposed to be trying to get at the truth, and they are sent there for that purpose. On one point at least there is never any difference between the two. The fifteen jurymen are unanimous in desiring that the mouth of the prisoner be opened. No one ever saw a juryman who was not so desirous, unless he had already, from opinionativeness or partiality, closed his mind against further light. But it is not the fifteen men on that side of the Court alone. Every man within the building, who is not either professionally engaged or interested as a partisan, desires, precisely in so far as he desires the truth and finds it doubtful, that light should come to him from this quarter as from others. There is only one man in the Court who is bound to exclude that light, and he is—the representative of justice.

We have stated the right of the jury to listen to the prisoner's

[1] So Mr. Justice Stephen. To make no provision for the interrogation of the prisoner "shows such an obvious neglect of the most natural and important way of obtaining information, that it requires some strong justification before it can be considered as anything else than a defect."—*General View of the Criminal Law*, p. 191.

story as equal to that of fifteen men round a private table. But of course it is enormously stronger. And we do not found this assertion merely upon their being officially called to investigate and ascertain the truth. We found it on the fact that the accused is there confronted with them for the very purpose of the trial of his cause. For from this two things result. In the first place, there is no question of hearsay. They have the best evidence from the best quarter when they have the statement of the man who did the thing, or did not. And secondly, what is of still more importance, they have him there in a way which, for our friends round the dinner-table, was impracticable—for cross-examination. It is the maximum of available light from the most important quarter, proffered at the time when it can be compared with all the other light from other quarters, and when the whole can be used legitimately and used together. It will need very strong objections to justify us in shutting our eyes to that.

Most of the objections stated are not really objections to the principle, but rather to particular ways of carrying out the principle, of including the evidence of the accused. One, however, is more general, and to give it every justice we shall take it in the words of the Dissent printed and laid on the table of the Faculty last year:—

"One great and obvious objection to allowing prisoners to tender themselves as witnesses in their own defence is the presumption that would thereby be created against such as did not avail themselves of this option. Sec. 10" (of the Bill then under discussion) "endeavours to guard against this, by providing that failure to give evidence shall not create such a presumption. It does not, however, seem possible to counteract by any statutory enactment the force of a presumption which naturally suggests itself to the untrained minds of a jury. The only benefit of the provision would be that the judge would be bound to tell the jury that they must dismiss any such presumption from their minds."

Now it may be at once granted that if prisoners were allowed to tell their story a presumption *would* be created against those who refused to do it. But that this is a "great and obvious objection" we deny, for the simple reason that we believe it to be a very great and a very obvious recommendation. There would no doubt be such a presumption—and there *ought* to be such a presumption. In every decent system of jurisprudence, and under every form of trial, the refusal (on the part of one who is accused by public authority of having committed a crime) to tell the facts which he knows, ought in reason and in equity to weigh against him. That may be a strong statement, but we are prepared to make one still stronger. In every conceivable system, and under every conceivable administration of it, it *must* weigh against him. Let statutory enactments and the instructions of the judge under them be what they may, they are valueless against the common sense of the case and

the conscience of the jury. Of course the presumption thus created is not an absolute one; it is not conclusive against the accused. That also is a matter of common sense, which there may be no harm in embodying in the tenth section of a statute, and which may find its place very appropriately in the charge of the judge. But when either the judge or the law goes farther, and instructs the jury that the voluntary silence of the accused is not a fact against him—is not a presumption *valeat quantum*—they obtrude a fiction which is so contrary to the instincts of justice as to be practically worthless. It is what De Quincey somewhere calls a "fierce impossibility." The jury cannot believe it if they would; cannot respect it if they tried. It is like requesting them to believe that two and two make five. The weight they attach to the presumption no doubt varies very much in particular cases. In the case of a nervous woman, entangled in some discreditable sequence of affairs, the presumption will appear to them less. In the case of a cool-headed and intelligent man it will appear more. But in both cases it already exists, it ought to exist, and it must exist. We quite agree that "it does not seem possible to counteract by any statutory enactment the force of a presumption which naturally suggests itself to the untrained minds of a jury." It is not in the least possible, except among the Inmates of that world where it is given to the common man to lift himself from the earth by his waistband, and to St. Denis to carry his head in his teeth. And it would be very unfortunate if it were possible. We say again that we think this not only a great but an obvious recommendation of the proposed change of system. It will bring into regular and recognised working, under the eye of the judge, a presumption which at present works in the mind of every juryman, working there inevitably, but working in the dark.

And this leads us to another objection, which is a much milder one than the last. It does not contend that two and two are not four, but it suggests that it may be better not to say so publicly. The first argument used on that side in the paper laid before the Faculty in March 1878 was, that the declaration emitted under the present Scottish system is enough, provided it be enacted (as the minority of the committee recommended it should be) that the accused shall always be entitled to lay his declaration before the jury. Now the first thing to be remarked on this is, that it is giving up the principle. If the accused were always permitted to lay his declaration before the jury, a presumption against those who did otherwise would inevitably be created in "the untrained minds of a jury," which "no statutory enactment" could meet. In fact even at present, when every juryman feels that the declaration is a most inadequate representative of the proper contribution which the accused should make to the evidence, and when he resents very much the option which the prosecutor has by law of bringing it forward or not—even at present, the absence of a

declaration tells to some extent, and occasionally to a very conclusive extent, against the prisoner. If, then, we take it that the Faculty of Advocates is unanimous in desiring that every prisoner should be allowed the option of telling his own story to the jury —but that some think it should be done orally and at the trial, while others think he should merely produce his declaration made before a magistrate—the question is much shortened. We doubt indeed whether the real debate is not over. For the declaration is by no means the point in our Scottish practice which is at present most approved; and its defects are by no means on the side of favour or even of fairness to the prisoner. It is at least impossible to compare a statement, taken in secret, perhaps before an inferior magistrate, always under the pressure of the public prosecutor, but without the help of counsel or agents for the prisoner, and without cross-examination—it is impossible to compare this as a channel of useful evidence with an examination or interrogation in open court. But the full extent of the inferiority of the present practice will not come out until we have looked at the next objection to the practice proposed.

This next is a very popular objection, urged always in England in defence of the maxim *Nemo tenetur prodere seipsum*, and urged again in the document with which we have just been dealing. It is said that if the accused were to give his evidence, a nervous or stupid prisoner would be at a great disadvantage in doing it. Now we pass by the obvious answer that so is every nervous or stupid *witness* at a great disadvantage, and that you have much less right to force him against his will into the witness-box, and make him tell his story under the sanction of perjury, than you have in the case of an accused. Every nervous person and every stupid person dislikes to give evidence. But the person of all others who has least right to act on that dislike is precisely the person whom this objection singles out to protect—the man whom the authorities believe to have committed a crime, and whom the jury invite simply to tell them the facts he happens to know. But we pass from that indirect though conclusive answer to the direct one. Suppose the change made, and the new system working. Why should the jury not make *allowance* for a nervous prisoner as well as for a nervous witness? Is there the smallest reason to doubt that they would do it? Is it not absolutely certain that they would make *more* allowance in the one case than they now do in the other? These questions answer themselves. And if the answer is obvious with regard to a Scottish jury, it is equally so with regard to the presiding judge. But even that is not all. Observe the conclusiveness of the answer when we compare this objection with the previous one founded on our practice as to "declaration."

It is said a nervous or stupid prisoner would give his evidence under disadvantage. Does a nervous or stupid prisoner make his

declaration under no disadvantage? Does the nervous prisoner cease to be nervous when privately pressed by the prosecutor? Does the stupid prisoner escape from his stupidity upon being cautioned by the magistrate? The truth is, the nervousness of the one and the stupidity of the other often rise to a maximum at the point of the declaration. Only, *no one knows it.* The jury can make no allowance for it. The prosecutor, if he chooses, uses the declaration; but who ever heard a Sheriff interrogated whether the mute prisoner at the bar had not been deadly stupid as he gave it, or had not on the other hand stumbled from one falsehood into another from sheer and manifest nervousness? Under the present system the prisoner has all the disadvantage of these natural or acquired defects, without the possibility of the jury or the judge making allowance for them. He has all the disadvantage, perhaps while being tried for his life, which the most nervous or stupid *witness* has in the witness-box, without the twofold remedy which every witness there has, first, of recovering from his fright while a process of judicious questioning extracts his real story; and secondly, of the presence of the jury, who invariably make allowance for such personal difficulties even in a cited witness, and would make far more allowance in the case of the accused. I must express my belief that, like the first objection, this third tells in the opposite direction from that for which it is proffered. The stupid and nervous prisoner is unjustly dealt with by the present declaration system. He, like others of other temperaments, would have his full measure of justice, *i.e.* allowance for his temperament as well as consideration of his story, if that story were told, as it ought to be, before the men who are to judge it. Above all, now that it is proposed to make the declaration system universal, by putting it in the prisoner's power at all times to make one and to insist on bringing it forward, the mischief of hiding from the jury what manner of man it is who makes the statement becomes manifest. For the one thing upon which we are agreed on both sides is that failure, even in a stupid and nervous prisoner, to tell his story, must in the future be accepted as a qualified presumption of guilt. It must be so under either system. But under the present system, where the jury cannot make allowance for the prisoner's defects of mind or will, but must accept the Sheriff's hearsay without even the Sheriff's explanation, the injustice is at its maximum. It is at its minimum where the jury, men themselves, have the man before them to tell his human story and to give explanations.

These seem to me to exhaust the real objections to the proposal itself. Other things that have been said relate to particular ways of carrying it out; whether, for example, the prosecutor should be entitled to interrogate the accused, leaving it to his own counsel to cross him; or whether the accused should be left to bring himself forward as a witness, if he chooses, with power then, and only in that event, to the prosecutor to cross-examine. Of the two, the

former seems the most natural and reasonable course, it being understood that upon the first question being put, whether from the prosecution or otherwise, the accused should ordinarily be invited to tell his story—in short, to make his oral declaration. That would involve no departure from the usual practice where a witness has a story to narrate, or is asked to account for himself during a particular time. It will be observed that the title of this paper speaks of interrogating the accused rather than of his tendering himself as a witness. There seem serious objections to the latter form of putting the matter. Yet it would have a twofold advantage for our argument. It is, in the first place, the phrase employed in the resolution of the Faculty. Still more important (if anything can be more important!) is the facility which it gives of citing, against the English practice, the English maxim that every man is presumed innocent till he is guilty. If this man at the bar, but uncondemned, is to be presumed innocent like every other, has he not the right to be a witness? The retort is witty and effective, but not so sound that we can consent to take benefit from it. There are already essential differences between the position of the man accused and that of other men. He is certainly not to be held guilty until he is convicted, but in the meantime he is detained in custody and abridged of his personal rights. He may be a witness, but he never can be a witness in the same sense and to the same effect as other men. The whole idea of his having right to tender himself (with the option of not doing it) we hold to be founded on a false theory. The true theory is that justice is entitled and bound to seek in all directions for the best evidence. It gives no option to third parties who it has reason to think may know the facts; it forces them to disclose them. Neither does it give an option to the man accused, in so far as he also may be supposed to know them; he is simply the very last man who is entitled to such a licence. But it is as the party accused, and the party therefore chiefly concerned, that he is called upon to tell his story; not as a mere casual witness or onlooker. The best proof of his different position is in the difference of sanction by which his evidence is enforced. We send other men to prison if they do not depone; and we punish them as perjurers if they depone falsely. No one proposes to add either the one sanction or the other to the invitation we now give, or may give, to the accused. But the reason for that is that every word from him is already uttered under another sanction—another twofold sanction. If he refuses to tell his story, we find in his refusal a greater or less presumption of guilt; and if he tells his story, and in it utters falsehoods, we find the same. That is the natural, normal, and just—and also, as we have said before, the inevitable—sanction under which the evidence of every accused is expected or given. And it rightly supersedes all the penalties by which we force evidence from other men, who are under no such immediate and obvious obligation to speak. We shall only add that we think with

most inquirers that the counsel for the prosecution and defence, rather than the judge, should be the interrogators; leaving it to the judge not only to control their proceedings, but to supplement them by additional questions from the bench in the usual way. The danger of that degenerating in this country into the overbearing and irrelevant inquisitorialism which is sometimes witnessed in France, we believe to be purely imaginary. The leaning in the administration of justice would rather remain what it is at present. The overwhelming tendency of the judge and of the jury would still be to let the guilty escape rather than that the possibly innocent should suffer. But while the system of interrogating the prisoner would, as we believe, demonstrably increase the chances of escape for the innocent, we do not deny that it would also increase the chances of conviction for the guilty. And if any one objects to that twofold result, we have really no more to say. A. T. I.

QUALIFICATIONS OF TEACHERS IN HIGHER CLASS PUBLIC SCHOOLS.

SOME very interesting questions as to the qualifications required by the Education (Scotland) Act, 1872, for the teachers who may be appointed in higher class public schools to take charge of the secondary education of a district, have been recently raised by a dispute among the members composing the School Board of the burgh of Haddington; internecine quarrel was the term we were about to apply to the proceedings, but interesting they certainly will be admitted to have been.

The appointment which gave rise to the difficulties was that of rector in the Knox Institute, a teaching institution taking the place of the former burgh school, which was duly scheduled in the Education Act as a higher class school. The intention of the Haddington School Board is to conduct the Institute under their own supervision and authority as a higher class school, and therefore to supply it with such requirements in the way of teachers, accommodation, and so forth, as may enable it as such to obtain a share of any available fund or grant from Government. For twenty-five years past an adventure school of a higher class has been conducted in the town of Haddington by Mr. Haig, and this school appears to have taken in many respects the place of the burgh school and supplanted it in the educational affections of the East Lothian parental mind, so much so, indeed, that Mr. Haig's school was well and honourably known, and his teaching had met with success and approbation. Now in these circumstances the School Board advertised for a rector for their Knox Institute, and some of the Board were favourably disposed towards the candidature of Mr. Haig for the second or English Mastership in the Institute,

and desired to have him appointed. Here, however, the question of legal eligibility arose under three sections of the Education Act of 1872. These sections are in the following terms:—

Section 56.—No person shall be appointed to the office of principal teacher in a public school who is not the holder of a certificate of competency. But any person who at the time of the passing of this Act is the principal teacher of a school under the recited Acts or any of them, or of a burgh school, or the holder of a certificate from or registered as a certificated teacher by the Lords of the Committee of Council on Education, or who is a teacher in a burgh school and a member of the council of a Scotch university, shall be deemed to be a holder of a certificate of competency.

Section 59.—When a degree in arts or science of any university in the United Kingdom, conferred after an examination in all or any of the subjects specified by the Department as subjects for the examination of candidates for a certificate of competency, is held by any such candidate, the examiners may lawfully dispense with his examination in such of the said subjects as he has already been examined in on obtaining the degree.

Section 62.—With respect to burgh schools existing at the passing of this Act in which the education given does not consist chiefly of elementary instruction in reading, writing, and arithmetic, but of instruction in Latin, Greek, modern languages, mathematics, natural science, and generally in the higher branches of knowledge, the following provisions shall have effect:—

(1.) Such schools shall be deemed to be higher class public schools, and shall be managed by the school boards accordingly, with a view to promote the higher education of the country.

(2.) A school board having the management of any such school may from time to time fix the standard of qualification of all or any of the teachers to be appointed thereto, and determine the subjects of the examination to be passed by them respectively, and from time to time appoint examiners (who shall be professors of some Scotch university or teachers of distinction in a higher class public school) to conduct the same, and the foregoing enactments with regard to certificates of competency shall not apply to teachers of higher class public schools whose qualifications have been fixed and ascertained under this provision: but any person who at the time of the passing of this Act, being a master in a higher class school, is a member of council of any of the universities of Scotland, shall be deemed to be the holder of a certificate of competency for the office of teacher in any of the said higher class schools.

(3.) [Contains provisions as to funds and revenues of these higher class public schools.]

(4.) [Provides for confining elementary education and higher class teaching to their respective kinds of schools.]

(5.) [Regulates the fixing of fees.]

(6.) [Directs an annual examination, and provides for the attendant expenses.]

The section concludes by a reference to the Schedule of the Act (C) enumerating the schools thereby made public schools of the higher class, including the burgh school of Haddington in a list containing in all eleven schools; and there is also provision made to enable

the school board of any burgh by resolution at a special meeting to raise any school under its management to the position of a higher class public school—subject to the approval of the Board of Education. It may be incidentally mentioned here that since the Act became law in 1872 six burghs have taken advantage of this provision, namely, Arbroath, Hamilton, Irvine, Leith, Peebles, and Dunfermline.

Now in this dispute at Haddington it must be borne in mind that Mr. Haig's school was one in which the elementary and primary branches of education were taught as well as the higher and secondary branches. The teacher himself was a member of the Edinburgh University Council, but when the Education Act of 1872 came into operation he was not the teacher of a "public school" as therein defined to mean "any parish or burgh school, or any school under the management of a school board," for he was in no way under the control of the Haddington School Board, but merely the owner of an adventure school in that burgh. Again, Mr. Haig held no Government certificate as a teacher, nor was he a graduate of any university. It was urged on Mr. Haig's behalf that if he were not qualified the same grounds of disqualification might prevail in many other instances where teachers had for years taught higher educational branches with the further advantage to their pupils of having enjoyed the benefit of a university training, while the Act would in such a view enable men who had been teachers merely in parish, parliamentary, or ragged schools to become eligible candidates for these higher class school appointments. One of the School board members pointed out that if instead of having been the chief teacher and manager of the thriving and rival adventure school, Mr. Haig had been merely the assistant of the former rector of that burgh school with which he had so successfully competed under manifest disadvantages, he would have been in any aspect of the matter qualified for the appointment he now sought. The members of the Board who were in favour of appointing Mr. Haig took the view that the words in sub-section 2 of the 62nd clause of the Act were so expressed really to enable them to make such an appointment. Certainly there is a distinction in the wording of the two sections referring to this matter, for while in section 56 the qualifications are fixed for the "office of a principal teacher in a public school," and again in section 62, sub-section 2, while the words "teachers of higher class public schools" occur, yet in reference to the exception in favour of a member of any Scottish university council the words used are "being a master in a higher class school," and omitting the word "public."

The School Board resolved to take the opinion of counsel, and first of all that of Mr. Guthrie Smith, Advocate, was laid before them in the following terms:—

In my opinion the teacher in question is not eligible. His appointment would be contrary to the terms of section 56, and as at the date of the passing

of the Act he was not a master in a public school of the higher class mentioned in section 62, his case does seem to me to fall within the exception therein provided. The fact that he was actually engaged at the time in the business of teaching does not appear to be material, otherwise it would be impossible to know where to draw the line. The statute therefore provides that no person is to be deemed to be the holder of a certificate of competency who does not fill a certain character at the period of the passing of the Act, viz. as a master in a public school of the description mentioned. As higher class schools fall to be managed with a view to promote the higher education of the country, the governing body are at liberty to fix their own standard of qualification of all or any of the teachers to be appointed thereto; but this would require to be supplemental to, and not in substitution of, the regulations of the Code, if the right to the Government grant is to be continued.

This opinion, however, the Board did not regard as sufficiently explicit in regard to the question of the omission of the word "public" already mentioned, though as an opinion on their legal position otherwise it was very decided. In consequence, therefore, of this view they determined to consult also Mr. Balfour, Advocate, and Mr. W. C. Smith, Advocate, whose name is known educationally in connection with the legal portion of the seventh and latest edition of Mr. Sellar's Manual of the Education Acts published last spring. Their opinions were as follows. Mr. Balfour says:—

I am of opinion that Mr. Haig is not eligible for the appointment. Even if the School Board had fixed or were now to fix the standard of qualification for the teachers to be appointed to the school, so that Mr. Haig would in other respects conform to that standard, there would remain the question under the latter part of section 62, sub-section 2, whether he was "a master in a higher class school" within the meaning of the Act at the time when it was passed, and I consider that he was not, the term "higher class school" being there, in my judgment, to signify "higher class public school." It appears to me that the general scope and spirit of the Act are adverse to the view that the words "higher class school" were intended to include private adventure schools of a superior kind. However excellent the attainments of the masters of many such schools are, they do not of the mere fact of their being masters in the schools possess any publicly recognised standard of qualification, nor do the reasons which led to exceptions from the now existing conditions of qualification being made in favour of those who were the teachers of public schools at the time when the Act passed apply to teachers of adventure schools. I may add that unless and until the School Board fix the standard of qualification under section 62, sub-section 2, the rules as to qualification prescribed by section 56 must, in my judgment, govern.

Mr. Smith in his reply says:—

The Education Act, 1872, empowers school boards having the management of a higher class public school to fix the standard of qualification for the teachers in that school. In the present case that has not been done, and when it has not been done the provisions of sec. 56 apply, and a certificate of competency is required. This is clear not only from the absolutely general words of sec. 58, the expression "public school" being defined by the interpretation clause to include a school under the management of the school board, but it is implied in the declaration of sec. 62, sub-section 2, that the previous enactments regarding certificates shall not apply to the teachers of higher class public schools whose qualifications have been fixed under sec. 62; and it is further illustrated by the concluding paragraph of sec. 62, sub-section 2, which provides a statutory equivalent for the certificate of competency in the case of a higher class public school.

The Board proceeded to consider these opinions, and after a division did not appoint Mr. Haig, although he had formally offered to qualify himself for the office by obtaining a certificate of competency at the very next official examination for such certificates. The whole question really is probably the outcome of some slight inattention in draughting the Act, which has led to the accidental omission of the word "public" at a somewhat critical place. There was here, it is to be observed, no laying down of rules as to qualification by the Board, so that the statutory provisions necessarily receive full effect. When we look closely into section 56 we find that there are *four* classes of persons who, although some of them not actually possessors of certificates, yet for the purposes of the Act shall be deemed to be possessed of them. These four classes are—

(1.) Principal teachers in a parish school, side school, parliamentary school, or heritors' girls' school.
(2.) Principal teachers in a burgh school or "a teacher" in a burgh school being members of council of a Scotch university.
(3.) Holders of certificates from the Committee of Council on Education.
(4.) Persons registered as certificated teachers by the Committee of Council on Education.

Now Mr. Haig could not be said to fall under any of these four heads. The object manifestly of the section, as pointed out in Mr. Sellar's Manual, is to secure for the office of principal teacher in public schools only those who hold certificates; but certain exceptions are allowed so as to respect "vested interests" as they may be termed. If a teacher leaves his "public school" where he is for the purposes of the Act *deemed* to be certificated, and goes to a non-public school, he would lose the privileges of a certificated teacher previously enjoyed by him, and must abandon all claim to Parliamentary grant for his new school, and forego his pupil-teachers. Seeing this holds good, the converse argument, it is not difficult to see, may be applied with at least equal force. The exception in the Act was not intended for the benefit of those in Mr. Haig's position, it was for the protection of teachers already recognised as in State employment, and not to affect those who might have schools of their own, however successful. The Act contemplates in the not-far-distant future an absolute rule for teachers that they shall possess certificates of competency, and its only modification is one forced on the Legislature by the exigencies of the position and the necessity for meeting the case of those actually teaching in schools aided by Government grants when the Act came into operation.

It may seem hard, perhaps, on Mr. Haig, and those of his class, that such a rule should have to be enforced. In his own words he is "deeply interested in the cause of secondary education in the burgh and surrounding districts," and he does not wish that his "school should be any barrier to the success of your new Institute, but, on the contrary, that it should be an accession of strength to it." This, no doubt, is perfectly true; but Mr. Haig is for himself, and

other teachers of adventure schools are for themselves, fortunately or unfortunately, in the position of men who for their own profit have entered upon a mercantile speculation, and then when their premises are built and their concern in full swing, another richer or more influential firm comes upon the field to dispute the monopoly of the market. They do not of course—no one would expect it—teach for nothing in the shape of remuneration, and they must face the competition of the Government school in a struggle perhaps hardly equal, just as the tradesman must face the co-operative store.

NOTES IN THE INNER HOUSE.

THE case of *Hough and Others* v. *Athya & Sons* (May 27, 1st Div.) raises a question characterized by the Lord President as "one of some practical importance which has not hitherto occurred for decision in this Court. It may be stated generally to be this, Whether, in computing lay-days under a charter-party, the parts of days are to be taken as entire days, or whether the calculation is to be by hours." There appears to be no direct authority upon this point amongst the English decisions, but it has been decided by the Court of Queen's Bench that in the case of demurrage fractions of a day count as entire days. The Lord President could not see any distinction between such a case and one of lay-days, consequently that decision was held to be an authority. Further, it appeared to him of importance that this method of computing lay-days by hours was a novelty: "There have been many cases in which the Court has had to consider the number of lay-days, but it has never, so far as I am aware, been suggested previously to this case that the calculation is to be by hours. Now this is important, because in administering law of this description custom is of more weight than in almost any other branch of the law."

In *Cummings* v. *Mackie and Others* (June 4, 2nd Div.) the Court was called upon to determine whether the acknowledgment by the granter of a writ to a party not present at the time of signing, but who afterwards acts as a witness, must be in words. The point is mentioned by the Lord Justice-Clerk as one upon which there is no direct authority laid down from the bench. The Act 1681, c. 5, prohibits any one from acting as a witness unless he either saw the party subscribe or unless the party acknowledged his subscription when the witness came to sign. It is not said that the witness must *hear* the party acknowledge. And Dickson (695) says, "A virtual acknowledgment, or one exhibited by conduct, not by words, is sufficient provided it be clear and unequivocal." This is the opinion of the eminent conveyancer Mr. Bell in his treatise on

Testing Deeds, and also of Lord Chief Commissioner Adam as expressed in the *Earl of Fife's* case (4 Sh. 342). But this latter was a mere *obiter dictum*, as in that particular case the Judge held that there had been no acknowledgment either express or virtual. In *Cumming's* case Lord Craighill had, in charging the jury, said, "If there be at the time of the witnesses subscribing any sufficient acknowledgment by the party of his signature, in whatever form that acknowledgment may have been made, that is all which is required." To this an exception was taken. But the Court took the same view as that held by the presiding Judge at the trial. The Lord Justice-Clerk observed, "There is certainly a danger (as the Dean of Faculty pointed out) in admitting any doubtful words or deeds as sufficient, but I think that even acts, if they be sufficiently clear, would amount to acknowledgment under the statute. . . . It may be made by words, which is the commoner and less ambiguous method, or by act, in which case they must be more precisely and carefully scanned." And Lord Gifford, "The pursuers would have us insert 'in words,' but there is no such expression used. It is only required that there be no doubt of the acknowledgment really having been made. Now a party may acknowledge his signature in various ways—by words, which is the ordinary way, but if he cannot speak, what then? The pursuer would say, 'Then not at all;' but suppose a man unable to speak should write down his acknowledgment and point to his signature, or should speak on his fingers as dumb men do, surely that would be good in law. Why should we insist upon the word 'hear,' a word I think expressly excluded from the statute?" Upon another point raised by this case many will sympathize with the doubts expressed by Lord Ormidale. Assuming the soundness of the law laid down by Lord Craighill, did it apply to the issue in this case, by which the jury were asked to decide whether the witnesses did not see the party subscribe and *did not hear* him acknowledge his subscription? The Lords Justice-Clerk and Gifford were of opinion that the real point put to the jury was put to them under the statute. But Lord Ormidale, while agreeing with his brethren as to the general law, asks if this issue will admit of it? "It is a very specific one. But the Judge takes it thus, he lays down that it is of no consequence whether the witness did or did not hear the testator acknowledge his signature (there is no doubt that he did not see him sign) provided the jury be satisfied that in some other way the testator did acknowledge it to him. Now, does this answer the issue? That is my difficulty, and it is rather hard to obviate it." The somewhat peculiar case of *Tener's Trustees* v. *Tickle and Others* (June 28, 2nd Div.) relates also to the subscription of witnesses, and forms an illustration of the working of the 39th section of the Conveyancing Act of 1874. A deed disponing heritable property was prepared by an unprofessional man, the husband of the disponer. He was not aware of the necessity for

two witnesses, and although present himself it was attested by only one. Further, although the deed was unilateral it had been written out in a bilateral form, and was at first signed by two out of a number of trustees to whom the property was conveyed. Their signatures were also attested by a single witness. After the death of the disponer, her husband ascertained that the signatures of two witnesses were necessary, and accordingly signed himself. A second witness signed for the two trustees, and the remaining members of the trust also added their signatures before two witnesses. The question came to be whether, in spite of these admitted informalities, it was competent under the 39th section of the Conveyancing Act, 1874, to prove that the deed "so attested was subscribed by the granter or maker thereof, and by the witnesses." It was maintained by the objectors that the testimony of a person who had not been called as a witness, and who signed after the death of the granter, was invalid, that a witness must have been requested to act in this capacity. The Court held that upon the admitted facts this deed was under the statute valid. The Lord Justice-Clerk said, "It is not, in my opinion, necessarily fatal to a deed that the attesting witnesses have signed after an interval, or that they have signed after the death of the granter. . . . It was argued with much earnestness that Mr. Tener could not be a witness, because he was not desired by the granter to attest his signature. But there is no place for that argument in the admitted facts. No doubt subscriptions before a casual, an accidental, or a concealed witness may not amount to subscription as required by the statutes. But there is no such case here. . . . It was said that this was a mutual deed, and that it was not fully completed by both parties before the death of one. It is no doubt in the form of a mutual indenture, but it is in substance a unilateral conveyance delivered before the death of the granter, and sufficiently accepted by the signatures of any of the administrators." Lord Ormidale seems to have concurred with reluctance, observing, "The parties have now under the recent statute only the examination of the witnesses to rely on, the party founding on the deed having the onus of proving its validity laid upon him, and thus I am afraid a great opening is given for fraud." Certainly the tendency of the statute is greatly to lessen the distinction between parole and written testimony.

In the case of *Rogers* v. *The Inland Revenue* (June 28, 1st Div.) it was decided that the captain of a British vessel was liable in income tax assessment although absent abroad during the entire year to which it applied, he having his wife and family in this country. The Lord President observed, "Every sailor has a residence on land, as Lord Mackenzie very well puts it in the case of *Brown* v. *M'Callum*, and the question is, Where is this man's residence? The answer undoubtedly is that his residence is in Great Britain. The circumstance that Captain Rogers has been absent from the country during the whole year to which the assess-

ment applies does not seem to me to be a speciality of the least consequence. That is a mere accident. He is not a bit the less a resident in Great Britain because the exigencies of his business have happened to carry him away for a somewhat longer time than usual during this particular voyage."

Lastly, notice the question raised in *Sharp* v. *M'Cowan* (July 4, 2nd Div.). In an appeal from the Sheriff Court the objection was for the first time taken that the successful party's agent had only signed the plea in law, not the petition or a condescendence. It was held that the objections should have been raised in the inferior Court, and that the fact of *litis contestatio* was a good answer to the objection that there was here no process. But Lord Gifford seemed to think a signature to the pleas in law alone sufficient.

THE CITY BANK APPEALS.

Now that the long and melancholy list of appeals in the City of Glasgow Bank cases is rapidly becoming a thing of the past, we have ventured to attempt a *résumé* of the whole of those already decided by the House of Lords, and to put our remarks in a shape, as regards brevity and arrangement, such as may prove less tedious than the necessarily long reports, while at the same time useful to those who desire to obtain in concise form a comprehensive view of what has been decided upon many points of interest, but especially upon the law of trusts in Scotland. Before, however, entering upon the subject-matter of these appeals, it may be somewhat interesting to our readers to know the proportion of the time of the Supreme Tribunal which has been occupied with these bank appeals. Exclusive of the two peerage cases which during the past session have been before the House of Lords, there have been in all twenty-six cases appealed from Scottish Courts, and of these exactly one-half are due to litigation arising directly out of the failure of the City of Glasgow Bank. The House of Lords in its judicial capacity has been occupied for fifty-four days with Scottish business, and twenty-five of these days have been spent in listening to the arguments and in delivering judgment upon the bank appeals. Finally, as to the general results obtained in the Appellate Court, we should feel very well satisfied; for our Courts in the north have been affirmed on no less than twenty occasions, there have been only two reversals, one case was compromised and one adjourned, while two were remitted to the Court of Session to take further steps of procedure. None of the City of Glasgow Bank appeals met with a reversal of the judgment of the Court below, though one was compromised and one remitted. On the 7th of April last the House of Lords took up the first of these appeals before a court consisting of no less than seven learned peers, probably the largest

number that ever sat in the House to hear an appeal. The case first argued and decided was that of *Muir and Others* (*Murdoch's Trustees*) v. *The Liquidators*, and the result of this appeal in particular was awaited with much interest and anxiety in the country, not but that the legal profession at least were fully prepared for the issue, still it was felt that the attempt was being made after a considerable interval and before an entirely changed Court to alter the judgment given in the case of *Lumsden* v. *Buchanan* (H. of L. 3 Macph. 89), and the other Western Bank cases which followed upon it.

We confess to having shared completely the opinion of those who believe that *Lumsden's* case truly may be said to mark the date of the introduction of an entirely novel principle into the law of Scotland, and that the judgment in that suit was really rather the application of the law of trusts and trust liabilities as understood prior to that time in England, than the logical deduction from or even the development of rules previously received as law in this country. Be that, however, as it may, *Lumsden* v. *Buchanan* stood written in the Reports in terms too unmistakable, and no lawyer can afford to despise the authority before which judges are so wondrous pliant, or to do otherwise than revere those volumes of "law calf" and their editors past, present, and prospective. Some one somewhere said that these editorial pundits often go beyond their sphere, and make law as well as record it; presumably this is done by touching up the warmth of expression in some judicial *obiter dictum* on which Mr. Editor is very strong, or by judiciously abstaining from the reproduction of sentences, or perhaps of whole opinions, which might mar in general estimation that reputation for perspicacity and mastery of the science of jurisprudence allowed by common consent or superstition to the whole Bench of this and every bygone epoch. We do not, however, pretend even to hint a doubt as to the report in *Lumsden* v. *Buchanan;* it tells what happened in those days in a manner far too good and too accurate, we fear, to have been pleasing to the appellants' counsel in these recent cases. The appeal, then, in *Muir's* case really seems to have had two main features—first, that the position of trustees in Scotland, as regards their holding such investments as bank stock, had been materially changed by the provisions of the Companies Act, 1862; and secondly, that the previous authorities, such as *Lumsden* v. *Buchanan*, cited against the appellants, did not apply, there being here different terms of contract, implying that the corporate body acting within its powers had contracted with the trust estate and not with individual trustees. As to the first point the position taken up by the appellants was that the bank under the Companies Act, 1862, being an incorporation, differed from a partnership in many ways. Thus no individual member having power to bind the rest. Again, in a corporation, one corporator was not liable for the corporate debts, nor were the individuals who had retired liable

for debts incurred even when they were still corporators, save by special enactment for one year, and that only when the funds of the existing members were insufficient. Trustees, though members, as such could not vote in the election of directors and managers; individuals could. The very word "partner" did not occur in the Act. Further, there was an express statutory exception in favour of Scotland as to notice of trust being entered on the register of companies (section 30), and that exception was the recall of a previous enactment on that very subject. Now in this test case of *Muir* the entry was "trust disponees" of two ladies, showing the recognition by the bank of their character of trustees. But in the next place an ingenious argument was founded on the distinctions said to exist between the present case and the previously decided authority of *Lumsden*. The contract between the parties in the Western Bank case, it was urged, bore its character stamped indelibly upon it. The trustees had accepted the transfer for themselves, their heirs, executors, and successors, thereby indicating the personal nature of the obligation they were undertaking. In *Muir's* case, however, the transfer bore to be to the persons in question, and their "successors and assigns whomsoever," and that too as "trust disponees." The agreement between the contracting parties, it was said, had amounted to the admission of these trustees merely in their representative capacity. No such question could arise in England, where no trusts are noticed; indeed, any attempt at obtaining such notice is invariably refused. It is not perhaps necessary for us, in so brief a *résumé*, to attempt to enter into any other questions raised by the appellant, as those we have given seem to bulk most in importance. The liquidators of the bank, however, contended that there was on the part of these trustees both partnership and personal liability. The petitioners (appellants), it was observed, sought to get their names transferred from the first part of the list of contributories to the second part, where their liability was "as being representatives of others." This was truly a list including only those not themselves partners, but representing those who were so, and the examples were given of the executors on a dead man's estate or the trustee in bankruptcy. This was the object of section 99 of the Companies Act, 1862, and of the reference to certain classes of contributories in sections 76, 77, and 78 of the same statute. Limitation of interest in a limited concern could only be effected by limitation by shares or by guarantee. But not only was there partnership, there was also unlimited liability, it was argued. The Western Bank was on all fours with the City of Glasgow Bank in this respect. In both the powers of the directors were the same, in neither was there mandate or *delectus personæ*. Long before 1862, when the City of Glasgow Bank was incorporated under the Companies Act, it had been in existence, and in existence as upon precisely the same footing as the Western Bank. The real charge introduced was that after the incorporation a creditor's

recourse ceased to be against any individual partner, and in place of a bankruptcy failure to meet debts would result in a liquidation. If liability had been limited by the incorporation, individual funds could never have been reached at all; and moreover, in the case of a company already existed when the 1862 Act became law, not one change was effected in the contract of copartnery, not one consideration arising from its construction was displaced. It had been found convenient by shareholders in Scottish banks to recognise trusts, and accordingly the interference with the practice of the nation had been avoided by the simple means of not making an Act upon the subject (20 & 21 Vict. c. 49) applicable to Scotland. This alone was the effect and purpose of the exemption of this country from the operation of that statute. The liquidators also argued from the case of *Lumsden* v. *Buchanan*, and pointed out that the true test of the liability was to be found in the terms of the contract. If a trustee took from a man who was liable universally, surely the liability of the taker was also universal, otherwise there could not be that continuity of partners contemplated in the contract of copartnery.

The petitioners in their reply urged that the fortune of the estate which they represented was liable universally, so there was no attempt to limit their liability. In *Lumsden's* case there was no incorporated company, and the terms of the undertaking by the trustees were not the same. If the contract as made were *ultra vires* of the bank, it was at once at an end, and each party would replace himself exactly in the position in which he was before any contract was attempted. If the section which allowed in Scotland trusts to appear *ex facie* of the register had any meaning at all, it must be that persons situated in the position of the petitioners were accepted by the bank as representatives of others, and therefore were entitled to the benefit of the Act 20 and 21 Vict. c. 49, section 99. The liquidators urged, on the other hand, that there was not here a claim on the part of the trustees to be put on the second part of the list because they represented a deceased shareholder, but because, though shareholders, they had disclosed the fact that they were so as trustees holding in trust. Now *Lumsden's* case met all such arguments. The mode in which their contract had been executed could not control the true meaning of the stipulations in the contract itself. The register, moreover, of shareholders on which the names of the trustees appeared was a list public in the sense of being open under the Act of 1862 to public inspection.

Further into the arguments adduced on either side we do not propose in this sketch to go, and our task will now be to point out the course of the opinions delivered in *Muir's* case in the first instance, and then after deducing some of the now well-established doctrines of the law from these opinions, to try and point out the necessity for remedial legislation, the effect of the legislation that has within the last few days received Royal Assent in the shape

of the Companies Act, 1879; and lastly, the direction in which we conceive reforms on this branch of our law should take.

In the Court of Session the liquidators gained a victory by the unanimous voice of the First Division. The Lord President, as to rule of liability established by *Lumsden* v. *Buchanan*, laid down this *dictum*: "Persons becoming partners of a joint-stock company, such as the Western Bank, and being registered as such, cannot escape from the full liabilities of partners either in a question with creditors of the company or in the way of relief to their copartners by reason of the fact that they hold their stock of the company in trust for others, and are described as trustees in the register of partners and the other books and papers of the company." And his Lordship went on to observe that the older judgment clearly applied unless one of two things were established—(1) variation in the law by subsequent modification; (2) essential difference in the contract of partnership of the Western Bank and of the City of Glasgow Bank. As to the first it was observed that the judgment in *Lumsden* v. *Buchanan* sanctioned and approved of the practice of noticing trusts on the register, not as affecting the nature or extent of the liability of partners so described, but as marking the shares with respect to which they might be registered as trust property. The statute of 1862 merely implied an acknowledgment of the existence of such a practice. There was not anything, the learned Judge said, done by the Act of 1862 creative of a corporation in the full sense of that term, and reference was made to section 191 in support of the view that no change had been effected on the nature and extent of the liabilities of the partners as existent prior to the passing of the Act. As to the second question, whether the contract of copartnery by the difference in its terms from that of the Western Bank favoured the immunity of these trustees, the 5th, 6th, 33rd, 38th, and 40th clauses of the contract were quoted, and his Lordship concluded: "It is difficult to conceive clauses in a contract of partnership more clearly expressing the common law rule that every partner is entitled to a share of the profits and liable to a share of the losses in proportion to the amount of his share in the concern, and that the partners are all liable mutually to relieve each other of the debts and engagements of the company, so as to equalize and distribute proportionally liabilities and losses. No power is given to the directors to admit partners in terms different from these, and no countenance is given to the notion that any partners can in these respects be in a more favourable position, or subject to a liability different either in kind or degree from that to which his copartners are subject." We shall only quote one observation made by Lord Deas, which, however, bears cogently upon this matter of trusts, and that remark was that "the genius of the law of Scotland is, and has always been, to encourage avowed trusts, and to discourage latent trusts. With that view the Statute 1696, c. 25, was long ago enacted, and still remains in

force, and I regard the judgment we are now to pronounce as leaving that general principle quite entire."

Lord Shand also considered that the Western Bank cases had foreclosed the argument of the petitioners, and observed that when those cases were decided the statute law as to notices of trust was just as it is at present. The fact of such trust-holdings of shares in a bank might always be legally noticed in the register of shareholders. Pointing out also that the law of Scotland as to proof of trust is very stringent, "too stringent for modern times, when parole evidence, including even the evidence of the parties interested themselves, is freely admitted"—requiring proof by writ of the alleged trustee or by his oath on reference—his Lordship added, "No more effectual way of avoiding the dangers of this limited mode of proof can exist than by having the title to the trust property qualified by a declaration on its face that the property is held for behoof of others. It may be that the notice of trusts on the register which the Legislature has always allowed, even in the case of joint-stock companies registered under statute in this country, may also have important effects in questions of title and transference of stock, in questions as to the effect of the death or resignation of one or more of a body of trustees." When the case reached the House of Lords it may be said to have been, despite the hostile judgment of the Court below, in perhaps a better position for the appellants, because while the lower Court were bound by the authority of the House of Lords in *Lumsden* v. *Buchanan*, that highest Court might possibly, though certainly not probably, alter its views with its own altered members, and go back upon its own decision. Just as in *Virtue* v. *The Police Commissioners of Alloa* the Court of Session gave effect to an English decision of the House of Lords, overthrowing a doctrine many years previously laid down by the same House in a Scottish appeal case, so some there were who thought the Court of Session might in their judgments have to give effect to law as altered by a new decision as to the liabilities of trustees. It was, however, found in the result that the former judgment of the House had been very carefully considered, much more so than in the case we have alluded to, and the House of Lords without difference of opinion affirmed the interlocutor appealed against. We have carefully examined the opinions of the learned Lords, have endeavoured briefly to analyze them, quoting where necessary isolated portions of the remarks made. The first opinion was delivered by the Lord Chancellor, who pointed out that, whether here or elsewhere, the first question must be, "*What is the contract which the parties have entered into? and that must be accompanied by another question, What is the contract which the parties were competent to enter into? For if words have been used of any ambiguity, or the object of which may be open to any doubt, that construction must, according to the well-known rules of law, be given which will make the contract a legitimate and valid one, and not the*

construction by which the contract will be destroyed." But there was here, his Lordship observed, no limit of liability whatever for the shareholders. In the principal clauses of the contract of copartnery there are laid down certain terms upon which alone the directors could admit an assignee of shares as a partner. "*If the partner is an individual, he is absolutely liable to the extent of his means as an individual for the proportion of the debt of the bank attributable to his share. If the partner is a corporation, the corporation is liable to the extent of all the property that it may possess.*" The view of the trustees in this case, the learned Lord pointed out, was that of absence of *individual* liability as regards the trust shares, and if this limit of liability could be created for some shares, why not for all ? The effect might be to create a limited liability company *without* compliance with the regulations of the Legislature enforced for all such companies. That this perhaps might be done, however, we cannot think impossible; witness the proposal—certainly ingenious, and we think feasible—to purchase on behalf of a limited company bank shares in an unlimited bank. The difficulty might, however, there arise as to the power of the board of directors in such a bank to accept such a company as assignees of their shares. Lord Cairns added that even in the absence of all authority his opinion was against the appellants.

We pass on, however, to the observations of Lord Hatherley, who said, that seeing no distinction between the present and the older cases, he found in the contract of copartnery itself the whole grounds of judgment.

(*To be continued.*)

WHAT IS A COUNTERFEIT COIN ?

THE case of *The Queen* v. *Hermann* (27 W. R. 475, L. R. 4 Q. B. D. 284), recently decided by the Court of Criminal Appeal, and to which we have previously referred, raised a point of a very subtle and curious nature. The Court were divided in opinion, Lord Coleridge, C.-J., Pollock and Huddleston, BB., forming the majority, and Lush and Stephen, JJ., the minority. The point was this. The prisoner was indicted for uttering counterfeit coin. It appeared that a genuine sovereign had been fraudulently filed at the edges to such an extent as to reduce the weight by one twenty-fourth part, and to remove the milling entirely, or almost entirely, and a new milling had been added in order to restore the appearance of the coin. It was held by the majority of the Court that the coin was false and counterfeit within 24 and 25 Vict. c. 99, s. 9. That section provides that whosoever shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble, or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England, etc.,

be guilty of a misdemeanour. By the 1st section of the Act it is provided that the expression "the Queen's current gold or silver coin" shall include any of the current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered so as to resemble, or be apparently intended to resemble or pass for, any of the Queen's current coin of a higher denomination; and the expression "the Queen's current coin" shall include any coin coined in any of her Majesty's mints, or lawfully current by virtue of any proclamation, or otherwise, in any part of her Majesty's dominions. The majority of the Court thought that "counterfeit" meant anything that pretended to be that which it was not; consequently that a coin which had been clipped so as to lighten it, and then so dealt with as to conceal the fact, and to make it appear to be a coin of full weight, was a counterfeit coin. The minority thought that the natural ordinary meaning of "counterfeit coin" was spurious coin made in imitation of coin issued from the mint or lawfully current, and that the coin in question having been issued from the mint could not therefore be counterfeit. They relied upon the interpretation clause, which enacts that the expression "the Queen's current coin" shall include any coin coined in any of her Majesty's mints, and also upon the fact that where tampering with such coins was meant to be equivalent to counterfeiting, special provision to that effect was made by the Act, as in the case of gilding a coin of a lower denomination. It appears to us that it is a weak point in the judgment of the majority that they do not deal with the argument arising from the definition of "the Queen's current coin." Huddleston and Pollock, BB., both say that after the clipping of the edges the coin had ceased to be current coin, and the addition of the milling, therefore, made them counterfeit current coin. But this rather passes by the argument of Lush and Stephen, JJ., who point out that these coins come within the definition of her Majesty's current coin as having been coined in her Majesty's Mint. Lush, J., says, "The coins were issued by the Queen. They were current coins before they were clipped. Coins only clipped remain current coin within the statute. The expression 'the Queen's current coin' includes any coin coined in any of her Majesty's mints."

The force of the argument is this. If the coin in question remained real current coin within the definition, how could they be counterfeit current coin? We are disposed to think that the view taken by the minority of the Court was the sounder view upon general principle. The difficulty arises from the fact that, though there is a section making it an offence to tamper with coin for the purpose of diminishing its weight, there is no provision making the uttering of coin so tampered with knowingly an offence. This is a flaw in the legislation on the subject. There are persons who, endeavouring to look to the substance of things, are always prone so to construe Acts of Parliament as to include things the mischief

of which is substantially similar to that of things obviously within the words. So many decisions in our Courts are immediately followed by legislation reversing the effect of the decision that, to many persons, it has often seemed a pity that by a somewhat more liberal construction of words the judges could not have made out that to be the law which the Legislature will infallibly make law directly their attention is directed to the fact that it is not law at present. It may be that our judges have frequently been too narrow in their construction of Acts of Parliament, but the opposite tendency is, in our opinion, a highly dangerous one. The general public and the newspapers are very apt to make use of the usual commonplaces in derogation of the lawyer's art when it appears that the words of an Act of Parliament are not sufficient to hit some obviously dishonest act, but the trained lawyer who has considered what the "law" means, knows that it is of the very essence of law that his power to deal with things according to their substance should be often restrained by the accurate interpretation of words. It is the judge's function to interpret and not to legislate, and this particularly holds good of criminal enactments. It seems to us a far safer principle to construe penal enactments strictly, and leave flaws to be amended by subsequent legislation, than to strain words from their ordinary and everyday meaning by subtle philosophical interpretation.

We must admit that, approaching the point in *The Queen* v. *Hermann* with this principle in full view, we have not found it easy to see which contention is correct, but we are, as we have said, disposed to think that it is straining the ordinary meaning of the word "counterfeit," as applied to "coin" by the Act in question, to make it apply to a coin which was originally genuine, but has been tampered with, as the coin in this case was. Let us proceed by steps in our analysis of the case. The coin was at one time genuine, as it was a coin issued from the mint. It was clipped. That alone did not make it counterfeit. It remained still genuine therefore; a lightened coin of less than the full value, but not a counterfeit coin. Then a milling is put to conceal the fact of the coin having been clipped. This milling is, no doubt, a deceit for the purpose of giving the coin the appearance of a genuine coin that has not been clipped; but if it be granted that the coin was still a genuine coin before the milling was put, we have great difficulty in seeing how the addition of the milling can make it a counterfeit coin. There is no doubt that a moral offence has been committed, which appropriate words ought to make a criminal offence; but the question is whether this is a counterfeit coin within the natural scope and meaning of the enactment.

Lord Coleridge goes into regions that seem to us to approach far too nearly to metaphysics for the purposes of criminal law when he argues that "the coins were counterfeit in the strict and grammatical sense of the word; they were made other than that

they ought to be; they were made to resemble that which they were not." This is, no doubt, true; but it seems to us that this mode of reasoning is a dangerous one. It is not, we think, a safe mode of construing an Act of Parliament to deal with the meaning of words in such a general and abstract manner. In one sense the coin was a counterfeit coin—that is to say, it was a coin which had ceased to be a perfect sovereign, and by what was done it was made to resemble a perfect sovereign. But the question is whether this was a counterfeit coin *within the meaning of the term as used by the Act*, for it may often be that it is obvious, from the context of an Act, that a term capable of a broader signification is used in a narrower one.

The substance of the argument on the part of the dissentient minority is that "counterfeit coin," as used in the Act, means coin that never issued from her Majesty's Mint or was made lawfully current by proclamation or otherwise. We are disposed to think that that argument is really evaded altogether by the judgments of the majority. If the question had to be determined without reference to any interpretation clause, or any considerations derived from the context and scope of the Act, there is no doubt that a good deal of metaphysical subtlety might come into play. What is a counterfeit of anything? The truth is, the coin is partly counterfeit and partly not. The milling is counterfeit. Could a man be said to be a counterfeit man because he had false teeth? But then it may be answered that the milling is not analogous to a man's teeth. The new milling is a false assertion that the aggregate weight of the whole coin has not been diminished, it being an essential characteristic of the coin to be of a certain value, whereas a man's teeth do not imply anything as to the genuineness of the rest of his structure. It might, therefore, be argued that a coin, any part of which is counterfeit, is a counterfeit coin altogether. We should be disposed to agree in this view and in that of Lord Coleridge if we thought the question turned on the considerations on which he makes it turn; but we do not feel clear that it does turn on those considerations. At the same time, we must admit that there are difficulties connected with the view of the minority of the Court. Pollock, B., instanced the case of a coin being lightened and alloy subsequently added to counterbalance the gold abstracted. But we do not think that case analogous; for there, spurious matter being actually added to that which issued from her Majesty's Mint, the whole coin does not remain genuine. But a case has occurred to us as conceivable in theory, though perhaps it would not occur in practice. Suppose a coin were thick enough to allow of the removal of a certain thickness of it without challenging instant observation by the loss of weight, and suppose, without the addition of any new material, a new face could be struck on the pared side. Would this be a counterfeit coin? We should hesitate

to say no. But we apprehend that this may be so consistently with the reasoning of the minority in *The Queen* v. *Hermann*. It is clear that the disc of metal issued from her Majesty's Mint, with certain marks thereon, and called a coin, may be so dealt with as that, though the same metal or part of the same metal may continue to exist, the coin may not. The whole might be melted, and part being abstracted, the rest might be recoined. Then, clearly there would be no identity of coins. The personality of the original coin (so to speak) would be gone. So, possibly, some course of dealing short of melting down and recoining might so far alter the identity of the coin as that the ultimate coin could not be said to be identical with the original. In *The Queen* v. *Hermann* the reasoning of the minority depends on the fact that the identity is not gone. The sovereign still remained the same coin, though the edges were clipped. It could not be called a different coin. The point is a very interesting one, though it induces a certain irritation of the intellect that such perplexities should exist by reason of the difficulty in making words exactly fit things. The result is one which cannot be regretted so far as the particular case is concerned, and the arguments are, after all, not very unequally balanced; but we confess if we had been called upon to decide, as at present advised, we should have inclined to the opinion of the minority.—*Solicitors' Journal.*

JUDICIAL STATISTICS IN AMERICA.

WE take the following from the *Britannic*, a new journal devoted to English interests in America:—

"The Court of Appeals, the highest judicial tribunal of the State of New York, determines the law on questions of appeal from the General Term of the Supreme Court, the Superior Court of the City of New York, the Superior Court of Buffalo, the New York Court of Common Pleas, and the City Court of Brooklyn. These, in turn, form an intermediate body of appellate Courts, to which appeals are made from various inferior tribunals. Whether the law is properly administered by these inferior tribunals is determined, in case of appeal, in the first instance by the intermediate appellate Courts; and, finally, by the Court of Appeals. Most of the cases decided by the last-named tribunal are appeals from the General Term of the Supreme Court. The decisions of the Court of Appeals are regularly reported and tardily published. In the volume last issued (71 New York) there are reported 130 cases decided between October 2, 1877, and January 15, 1878. The judgment of the lower Court was affirmed in 97 and reversed in 33 cases. The number reversed was about 25½ per cent. of the number

decided. Lest it may be thought that these results are not fairly representative, let us take a greater number of decided cases, and extending through a longer period, so as to enlarge the field of observation and obtain a broader basis for generalization. The latest four volumes of the Court of Appeals Reports cover the period extending from December 22, 1876, to January 15, 1878, or about one year. During this time 476 cases were decided. The decision of the Appellate Court below was affirmed in 345 cases, reversed in 121, and modified in 10. The lower Court, therefore, was overruled, wholly or partly, in 131 cases out of 345, or in about 27½ per cent. of the whole number appealed.

"If this startling amount of error has been found in the law as expounded by the Intermediate Appellate Courts, the question naturally arises, How far wrong are the lowest tribunals, the Courts of first resort, in their supposed administration of justice? The four volumes of reports under consideration afford the data for determining this question in the case of only 349 of the 476 judgments there reported. Of these 349 cases, the decision of the lowest Court was affirmed by the Court of Appeals in 209 cases, reversed in 128, and modified in 12, making 140 cases, or 40 per cent. of the whole number in which the law was held to have been erroneously administered by the tribunal of first resort. This astounding percentage of error is corroborated in the case of certain of the Courts of first resort by the results of those cases which are appealed to the General Term of the Supreme Court. This Court, consisting of three justices, sits as an appellate tribunal in each of the four Judicial Departments into which the State is divided for this purpose. It hears appeals from various inferior tribunals and judicial officers, but chiefly from the special terms and circuits, which are held by a single justice from the Supreme Court. Its decisions are officially reported and published. Of the 326 cases decided in the four departments, and reported in the two latest volumes of reports (21 and 22 New York Supreme Court), the decision of the Court below was affirmed in 177 and reversed in 149 cases. In other words, the lower Court was declared to be wrong in more than 46 per cent. (!) of all the cases which were reviewed by the General Term of the Supreme Court. The proportion of erroneous decisions varied in the different departments. In the First Department (New York City), 50 of the 15 cases passed upon were affirmed and 35 reversed; in the Second, 34 of the 58 were affirmed and 24 reversed; in the Third, 38 of the 81 were affirmed and 43 reversed; in the Fourth, 55 of the 102 were affirmed and 47 reversed. Thus, of all the cases heard more than 41 per cent. were overruled in the First Department, more than 41 per cent. in the Second, more than 53 per cent. in the Third, and more than 46 per cent. in the Fourth. These results, based on 326 cases decided by the General Term of the Supreme Court, and reported in the latest two volumes of official reports, may be taken

as a fair average of the character of the judicial work done by the lower Courts and reviewed by the Supreme Court. They show that 46 per cent. of that work is vitiated with error. These figures, however, do not represent all the decisions appealed from the Courts of first resort, since some of these appeals are brought before other tribunals than the General Term of the Supreme Court. But we have seen that the conclusion drawn from the Supreme Court reports is corroborated, in a large measure, by the action of the Court of Appeals. The latter Court, as has been shown, reverses about 40 per cent. of the decisions made by the lowest Courts, and about 27 per cent. of those rendered by the intermediate appellate Courts.

"These figures represent only those cases which are appealed, and which form but a part of the entire litigation of the State. It may, therefore, be objected that they afford no criterion of determining the amount of error in the work, as a whole, done by the Courts. That they do not show conclusively and precisely to what extent the law is erroneously interpreted, is clear. But it is not true that they afford no means of determining with fair approximation the character of our judicial work. It may be argued, on the one hand, that only those actions are appealed in which the original decision was clearly wrong or its soundness exceedingly doubtful, and that those decisions from which no appeal is taken are presumably correct. This argument has some force. But it is not true that a decision is presumably sound in law because no appeal from it is made. The question whether an appeal shall be taken is oftener controlled by other consideration. Carrying a case to a higher Court involves costs, delay, and vexation, which lead most litigants to bear the ills they have rather than fly to those they know not of. It is not unreasonable, then, to assume that those decisions which are reviewed by the higher Courts afford a tolerably fair specimen of the character of a very large part, if not the whole, of the judicial work done in this State; and that the percentage of error exposed by the appellate Courts shows, with a reasonable approximation, the alarming extent to which the laws are wrongly administered by the lower Courts in America, yet it is hardly for the *Britannic* to point out the reasons, though they are fairly surmised and in many cases thoroughly ascertained."

SELF-DEFENCE TRIUMPHANT.

AT a term of the Orange County Court, New York, held some time ago, the following case was tried, upon which the jury was addressed by the defendant, who had concluded to appear in his own defence:—

The People v. *James Allerton.*—This was a very interesting case, rendered so from the fact that the defendant acted as "his own

lawyer" on the trial, without having the advantage of being one of the legal fraternity. His "summing up," of which we are able to give nearly a verbatim report, with the exception of the "acting," was decidedly rich, and afforded much amusement for the legal gentlemen present. The defendant, who is a small, red-haired, thin specimen of a Yankee, was indicted for an assault and battery on one Mr. Dodder. The facts, as divulged upon trial, are briefly as follows: The defendant is in the employ of the Mongaup Valley, Forrestburg, and Port Jervis Plank Road Company as a toll-gatherer, and resides upon the road, some miles above Port Jervis. He and the complainant, Mr Dodder, are near neighbours.

On a Sunday in February, last the defendant saw the complainant in the act of beating his (defendant's) cows along the highway, and as an inducement for him to quit, hurled a few stones at him, one of which, as the complainant testified, struck him on the back of the neck.

The testimony being concluded, the defendant addressed the jury as follows:—

"Gentlemen of the Jury,—I don't know much about law, and since the trial has been going on I have concluded that I ought to know a little more. I ought to apologize perhaps for appearing in my own defence, and will do so by telling you that I feed one lawyer and hired another in this case, but they both come up missing when I need them most. I suppose I might have secured the services of some of these other 'limbs of the law' that I see around me, but, having been cheated by two of 'em, I concluded to go it 'on my own hook,' and here I am! I want to tell you, gentlemen, before I go further, that it is not my fault that this case is here taking up the time of this honourable Court. I think you will give me credit for telling the truth when I say that it ought to have been tried before a justice of the peace, it being better adapted to the capacities of such a court than of this one. After this difficulty Dodder did get a warrant for me from Squire Cuddeback, over in Deerpark. He then charged that I had assaulted him; but five or six months have freshened his recollection, and he now says that I assaulted and battered him. I believe there is some difference between the two charges.

"Dodder says he swore to the complaint before Squire Cuddeback, and I leave it for you to say whether he tells the truth now in saying that I battered him. I was taken by a constable before the squire, and either because the justice was ashamed of what he had already done or hadn't time to attend to it, I don't know which, it went down. Two or three weeks after that I was arrested again, and my wife having been confined, I thought it best, as a dutiful husband, to be around home, so I got rid of it by giving security for my appearance to court.

"You know, gentlemen, that I am in the employ of the Mongaup Valley, Forrestburg, and Port Jervis Plank Road Company as a gate-

keeper. This company, it seems, had sufficient confidence in my integrity and honesty to place me in that important station, and even if I should receive $3000 and steal $1500 of it, that's between me and the company, and it's none of Dodder's business. Now, when the company sent me up along this road to collect tolls, this Dodder was one of the inhabitants I found there in the woods, and I will say for him that he is a very fair specimen of the rest of the population. But there isn't any of them that seem to appreciate all the benefits of this plank-road.

"It let out to civilization a class of people who never before realized the idea that there was such a thing as civilized life, and this Dodder is one of them. It is a fact that soon after I moved there a young woman, seventeen years old, come down out of the mountains on the plank-road one day, and said she had never been out before. She fairly seemed surprised to see a white man, and after asking a few questions went back into the woods. This Dodder was my nearest neighbour, and a good deal nearer than I wanted him; and I hadn't been there long before I heard he had been lying about me to one of the directors, and I soon found out that he wanted to get his son, who was sworn here against me, in my place. But he hasn't done it yet, and if you don't convict me I reckon he won't very soon.

"It won't take long to dispose of Dodder No. 2. He testifies that he saw me throw three stones at his father, and saw the 'old man dodge.' On his cross-examination he says that he was in his own house in the woods, and had to look over a hill twenty feet high, and also over three slab fences and two stone walls! Well, if he tells the truth, all I wish is that I had young Dodder's eyes. He is certainly a remarkable boy, and can't consistently deny his '*father*.'

"I am willing to admit that I did wrong to throw stones at Dodder, and I apologize to all the world, and this Court particularly, for it. The doctors tell us that there are two causes for all diseases—predisposition and excitability. I think it was the latter cause that moved me to stone Dodder. I therefore confess myself guilty of the assault, but the battery I deny; and if you find me guilty of the battery I will appeal from the decision to the court of high heaven itself before I will submit to it.

"Now, gentlemen, you saw Mr. Dodder and heard him swear against me. I asked him a great many questions, and I was sorry to hear him answer as he did. I might have asked him if he didn't kill my cat, and if he didn't stone my chickens because they trespassed in his woods, where actually the rocks are so thick that the brakes can't find their way through them; but then I knew he would deny it, and it would grieve me to hear him. He admits that he was driving my three cows up the road, and that he struck at one of 'em, but says it was with a small switch. I have proved that this switch was a pole about ten feet long and about

three inches across the butt-end, and I have also proved that when he struck the cow fell. It is true my witness couldn't swear that the stick hit her, he was so far off; but take the blow and the fall together and we can guess the rest. If you, gentlemen, should see me point a gun at a man and pull the trigger, see the flash and hear the report, and at the same time see the man drop, I think you would say that I shot him, although you might not see the ball strike him.

"Now the fact is, gentlemen, that on Sunday I was lying on my lounge in my house, when my wife said to me that Dodder was chasing my cows. I jumped up and pulled on my boots and went out of doors and saw Dodder and the cows coming up the road. It is true, he says he was not driving them, but he says he and the cows were both going along the road in one direction, and this was as near as I could get him to the cows or the truth; but it is proved that the cows were going ahead of him, and he was following after them, striking at them with this little switch ten feet long, three inches across the butt, and I guess you'll think he was 'driving' them. I sung out to him, 'Dodder, stop!' but he didn't obey my order, and I just threw a stone in that direction, which went about ten feet over his head, at the same time going toward him, while he was coming toward me. He paid no attention, and I sung out again, 'Dodder, stop!' still he didn't mind me, and then I just threw another stone; but on he came and on I went, and I threw the third stone, which he says hit him in the back of his neck, but which I think is rather strange, as we were going toward each other as fast as we could. But he never slacked up, and by this time we were within about eight feet of each other, I halted and hollered at the top of my voice, 'Dodder, why in —— don't you stop?' About then he did stop, and raised his ten-foot switch as if to strike me. I sang out, 'Mr. Dodder, look out! You may wollup my cows, but if you wollup me with that switch you'll wallup an animal that'll hook!'" Here the orator made an appropriate gesture of the head, as in the act of hooking, which was followed with uncontrollable laughter that continued several minutes.

"Now, gentlemen, if you convict me, this Court can fine me $250 and jug me for six months; and if you really think I ought to be convicted of this assault, say so, for I am in favour of living up to the laws as long as they are laws, whether it is the Fugitive Slave Law, the Nebraska Bill or the Excise Laws. I will read you a little law, however, which I have just seen in a book I found here" (the speaker here picked up a law-book and read as follows): "'Every man has a right to defend himself from personal violence.' Now, I don't know whether that is law or not, but I find it in a law-book." (A veteran member of the bar, who was sitting near the speaker, remarked to him that it was good law.) "Well, gentlemen, here is an old man, who looks as if he might know something, and

he says this is good law. Now, if you will turn to Barbour something, page 399, you'll find that the same doctrine is applied to cattle. (Great laughter.) Therefore, I take it I had a right to defend my cows against Dodder's ten-foot switch. Why, gentlemen, nearly all my wealth is invested in them three cows, and you can't wonder that I became a little excited when I saw Dodder switching them with his ten-foot pole. I am a poor man, and have a large family, consisting of a wife and six children, which I reckon is doing pretty well for as small a man as I am, and I could not afford to let Dodder kill my cows!

"Now, gentlemen, I don't believe you'll convict me after what I have said; but if you do, and this Court fines me $250, I shall 'repudiate,' because I 'can't pay.' And if I'm jugged for six months, why, these Dodders will have it all their own way up there. But, notwithstanding all this, I am willing to risk myself in your hands, and if you think I ought to have stood by and not done anything when I saw Dodder hammering my cows, why, then I am 'gone in,' toll-gate and all.

"It is true I am a poor man, but not a mean one. The name of Allerton can be traced to the Mayflower. When she landed the Pilgrims on Plymouth Rock, among the passengers was a widow, Mary Allerton, with four fatherless children, and I am descended from that Puritan stock; and from that day to this there has never lived an Allerton who hadn't Yankee spirit enough to stop a Dodder from polling his cows. I'm done."

Here the laughing was exceedingly boisterous, in which all participated, and it was several minutes, despite the repeated cries of "Order, order," by the Court, before order could be restored. Our eloquent and usually unvanquishable District Attorney, fearing to cope with so formidable an antagonist, merely remarked, "It is a plain case," etc., and left it to the jury, who promptly brought in a verdict of "not guilty."—*Chicago Legal News.*

Reviews.

The Law of Land Ownership in Scotland: a Treatise on the Rights and Burdens incident to the Ownership of Lands and other Heritages in Scotland. By JOHN RANKINE, M.A., Advocate. William Blackwood & Sons, Edinburgh and London.

NOTHING daunted by the greatness of the undertaking and the number of abstruse subjects which it embraces, Mr. Rankine has, by treating of the law of land ownership, endeavoured to fill up a very considerable "gap in Scotch legal literature." That his effort has been crowned with much success will, we feel assured, be the

opinion of all who study this learned and really interesting volume. Although the subject is strictly a Scottish one, the author has brought light to bear upon it from Roman, English, and modern Continental writers. Indeed the list of foreign authors quoted is positively formidable, embracing as it does such names as those of Huschke, Koch, Pagenstecher, Puchta, and Scheurl. Let no one, however, suppose that this work is unnecessarily encumbered by its author's learning; on the contrary, every page exhibits a clear and practical statement of our own law, which is after all the one thing needful. No subject is treated at undue length, and matter of little practical importance finds its proper place in the footnotes.

In his preface Mr. Rankine says, "The point of view taken up in the following pages is that of a person possessing lands or other heritages in Scotland, and the questions which it has been attempted to answer are mainly these: first, What or how much does he possess under his titles? secondly, How far is he restricted in the use and enjoyment of his property by limitations conceived (*a*) in favour of the Crown or the public, or (*b*) in favour of individuals? and thirdly, What are the public burdens which he is called upon to bear by reason of his ownership or possession?" The first part deals with possession and ownership generally, the definition of possession, its legal remedies, and the rights and privileges of ownership. Under this division are treated such subjects as trespass and game, part and pertinent, and valuation. Part second deals with restrictions in favour of the Crown and the public. Part third with those which the law has established in favour of individuals, and contains valuable chapters upon servitude. Under this head the author deals with landed estate as limited, arising either at common law or by the entail statutes. The fourth and last part deals with public burdens. We do not observe teinds amongst the burdens enumerated. Can it be that Mr. Rankine is too good a Churchman to place in any such category the maintenance of the established clergy? We fear not, seeing that manses and churches duly appear. But really in teinds we have so formidable a subject of inquiry that even Mr. Rankine might well fear to engage upon it, and be contented to refer his readers to the pages of Connell and Buchanan. Besides, it is only fair that he should leave some subject comparatively unexplored for brethren of literary ambition who may follow him. The appendix contains no less than twenty-six statutes or portions of statutes with notes. There is a copious index and list of authorities quoted.

We would call particular attention to the value of this work as containing really a very complete treatise upon what may be called parochial and county law. We feel sure that many a laird and even a laird's legal adviser has often felt the want of such a treatise. Upon succeeding to an estate the happy possessor suddenly finds himself a Commissioner of Supply, a member of parochial board, of the school board, or of the local authority; while, on the other hand,

his estate is being assessed under Militia, Valuation, Registration, Sheriff Court House, and other statutes. In such a position many questions of interest may arise, and although far from advising men to become their own lawyers, it is very desirable that those who are called upon to perform public duties should do so with some understanding of their legal position, we can imagine. The author himself expresses the hope that his work may prove useful "not only to the legal practitioner, but also to the owners of property in lands, houses, and other heritages, and to those generally who are in the possession or management of heritable property in Scotland." It may possibly surprise some of our landed gentlemen to learn that our law "knows of no penalty for a simple act of trespass," and that the trespasser "may indeed jeer at the time-honoured placard which threatens him with rigorous prosecution as mere *brutum fulmen*," or to find the legality of their shooting neighbour's dogs questioned. Land ownership is not, however, treated of in any restricted sense, and the proprietor of house property in towns will also find much useful information in these pages.

In other respects this book is of great value. Up to the present time our legal literature has contained no separate treatises upon such important subjects as mines, Crown rights, nuisances, and servitudes; but this volume of Mr. Rankine's goes a long way to supply the want, while he brings down to date the law relating to game and prescription. Mr. Rankine is the latest addition to the long and brilliant list of authors supplied by the Faculty of Scottish Advocates, and his work serves to show that that Faculty is in no danger of losing the reputation for learning and intellectual vigour which it has held so long.

A Practical Treatise on the Law of Parliamentary Elections in Scotland. By JAMES BADENACH NICOLSON, Advocate. Second Edition. Edinburgh: Bell & Bradfute. 1879.

MR. NICOLSON has produced a second edition of his excellent Treatise on Election Law at a very opportune time, when the registers are being carefully revised by both parties with a view to next general election. The present work is so well known that it is hardly necessary to say much in its praise. The chief feature of the new edition is the embodiment in it of the changes made by the Reform Act of 1868 and the Ballot Act of 1872. The general arrangement of the book is substantially the same as in the last edition. Matters connected with the election of Representative Peers for Scotland are first discussed, and then the Scottish representatives in the House of Commons are treated of. The constituencies in counties, burghs, and universities form the subject of the next part of the volume, after which the registration of voters in such places is dealt with. The proceedings at an election are given with sufficient clearness and accuracy, though the author

states in his preface that he has not entered with any minuteness of detail into the practice adopted in carrying out the provisions of the Ballot Act, as such details belong more to a separate book and involve a special kind of knowledge. The volume concludes with an exposition of the laws against bribery, and for the trial of controverted elections, while an ample appendix contains all the statutory legislation on the subject of election and Parliamentary representation in Scotland from the earliest times down to the present day.

The whole work bears marks of much diligent care and intimate knowledge of the subject. The only point which we think is somewhat open to doubt is a statement made in a note on page 13, that insanity supervening on the election of a representative in the House of Commons would probably void the seat, if the malady were clearly proved to be incurable. As it is very unlikely that any doctor would ever admit such a disease to be incurable, it is not probable that such a circumstance will ever happen as a seat being rendered vacant through the insanity of the representative. Meanwhile, if a member of Parliament becomes insane, the constituency would seem not to be able to do anything but wait until he recovers, or at least until another general election.

This work we have no doubt will speedily be in the hands of all the political and election agents in the country. It is absolutely indispensable to them, and so far as we can judge they could not have a safer guide.

Obituary.

THE HON. LORD JERVISWOODE.—One of the gentlest and most lovable men who ever graced the Scottish Bench has passed away from among us in the person of Charles Baillie, or to give him the name he was known by for a period of fifteen years, Lord Jerviswoode. Born of a Scottish family renowned in history and song, brother of the late Earl of Haddington, and connected by marriage with the house of Polwarth, the deceased gentleman was, as has been well remarked, "more closely and completely linked to the nobility of Scotland than any other Scottish lawyer of this generation." He was called to the bar in 1830, and officiated as an Advocate-Depute under successive Conservative Governments in 1844, 1846, and 1852. He was made Sheriff of Stirlingshire in 1853, Solicitor-General in 1858, and Lord Advocate in the same year. He sat in Parliament for the county of Linlithgow for a short time, but was raised to the bench in 1859. In 1862 he was made one of the Lords Commissioners of Justiciary. Lord Jerviswoode sat for an unusually long time as an Outer House Judge, not going into the First Division until 1872.

There he did not sit long, as feeling his health unequal to the work, he resigned his seat in 1874, and has since lived a life of retirement and repose at his residence at Dryburgh House, near the famous abbey of that name.

Though never occupying what might be called a brilliant position either at the bar or on the bench, Lord Jerviswoode possessed a large amount of calm, clear good sense, united with by no means contemptible abilities. His cast of mind was perhaps more judicial than forensic; the strife and wrangling of the bar did not seem suited to his gentle and high-toned nature, and it is to be regretted that by the exigency of fate he was kept for so long a time as a Judge in the Outer House, not entering the Division until a time when his faculties were on the decline. Though seldom indulging in long or closely-reasoned notes to his interlocutors, his judgments in general stood the test of review very favourably. But although generally brief, he could when occasion demanded write long and able judgments; witness his note to the interlocutor in the Cardross case, which, if we remember aright, was decided by him as Lord Ordinary. As a Justiciary Judge, his own natural uprightness and detestation of what was wrong made him harder on criminals than many a less high-minded man would have been, his sentences being generally pretty severe, though never vindictive. In private life he was most exemplary in all his relations. No one had less self-assertion or was more unaffectedly genial and ready to aid in every good work. It is but trite to say that his loss will be regretted by a large circle of friends; it is not too much to say that his memory will live in the hearts of all who knew him, as that of one whom to know was to love and esteem, and who was in every way, and in the best and truest sense, a thorough Scottish gentleman.

The Month.

The Banking Act.—The following is the text of the new Banking and Joint-Stock Companies Act:—

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the Companies Act, 1879.
2. This Act shall not apply to the Bank of England.
3. This Act shall, so far as is consistent with the tenor thereof, be construed as one with the Companies Acts, 1862, 1867, and 1877, and those Acts, together with this Act, may be referred to as the Companies Acts, 1862 to 1879.
4. Subject as in this Act mentioned, any company registered before or after the passing of this Act as an unlimited company may register under the Companies Acts, 1862 to 1879, as a limited company, or any company already

registered as a limited company may re-register under the provisions of this Act.

The registration of an unlimited company as a limited company in pursuance of this Act, shall not affect or prejudice any debts, liabilities, obligations, or contracts incurred, or entered into by, to, with, or on behalf of such company prior to registration, and such debts, liabilities, contracts, and obligations may be enforced in manner provided by Part 7 of the Companies Act, 1862, in the case of a company registering in pursuance of that Part.

5. An unlimited company may, by the resolution passed by the members, when assenting to registration as a limited company under the Companies Acts, 1862 to 1879, and for the purpose of such registration or otherwise, increase the nominal amount of its capital by increasing the nominal amount of each of its shares.

Provided always that no part of such increased capital shall be capable of being called up, except in the event of and for the purposes of the company being wound up.

And, in cases where no such increase of nominal capital may be resolved upon, an unlimited company may, by such resolution as aforesaid, provide that a portion of its uncalled capital shall not be capable of being called up, except in the event of, and for the purposes of the company being wound up.

A limited company may, by a special resolution, declare that any portion of its capital which has not been already called up, shall not be capable of being called up, except in the event of, and for the purpose of the company being wound up; and thereupon such portion of capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up.

6. Section 182 of the Companies Act, 1862, is hereby repealed, and in place thereof it is enacted as follows: A bank of issue registered as a limited company, either before or after the passing of this Act, shall not be entitled to limited liability in respect of its notes; and the members thereof shall continue liable in respect of its notes in the same manner as if it had been registered as an unlimited company; but in case the general assets of the company are, in the event of the company being wound up, insufficient to satisfy the claims of both the noteholders and the general creditors, then the members, after satisfying the remaining demands of the noteholders, shall be liable to contribute towards payment of the debts of the general creditors, a sum equal to the amount received by the noteholders out of the general assets of the company.

For the purposes of this section the expression "the general assets of the company" means the funds available for payment of the general creditor as well as the noteholder.

It shall be lawful for any bank of issue registered as a limited company to make a statement on its notes to the effect that the limited liability does not extend to its notes, and that the members of the company continue liable in respect of its notes in the same manner as if it had been registered as an unlimited company.

7. (1.) Once, at least, in every year the accounts of every banking company registered after the passing of this Act as a limited company, shall be examined by an auditor, or auditors, who shall be elected annually by the company in general meeting.

(2.) A director or officer of the company shall not be capable of being elected auditor of such company.

(3.) An auditor on quitting office shall be re-eligible.

(4.) If any casual vacancy occurs in the office of any auditor, the surviving auditor or auditors (if any) may act, but if there is no surviving auditor, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the vacancy, or vacancies, in the auditorship.

(5.) Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company; and any auditor may, in relation to such books and accounts, examine the directors or any other officer of the company: provided

that if a banking company has branch banks beyond the limits of Europe, it shall be sufficient if the auditor is allowed access to such copies of, and extracts from the books and accounts of any such branch as may have been transmitted to the head office of the banking company in the United Kingdom.

(6.) The auditor or auditors shall make a report to the members on the accounts examined by him or them, and on every balance-sheet laid before the company in general meeting during his or their tenure of office; and in every such report shall state whether, in his or their opinion, the balance-sheet referred to in the report is a full and fair balance-sheet, properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, as shown by the books of the company; and such reports shall be read before the company in general meeting.

(7.) The remuneration of the auditor or auditors shall be fixed by the general meeting appointing such auditor or auditors, and shall be paid by the company.

8. Every balance-sheet submitted to the annual or other meeting of the members of every banking company, registered after the passing of this Act as a limited company, shall be signed by the auditor or auditors, and by the secretary or manager (if any), and by the directors of the company, or three of such directors at the least.

9. On the registration in pursuance of this Act of a company which has been already registered, the registrar shall make provision for closing the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company; but, save as aforesaid, the registration of such a company shall take place in the same manner, and have the same effect, as if it were the first registration of that company, under the Companies Acts, 1862 to 1879, and as if the provisions of the Acts under which the company was previously registered and regulated had been contained in different Acts of Parliament from those under which the company is registered as a limited company.

10. A company authorized to register under this Act may register thereunder, and avail itself of the privileges conferred by this Act, notwithstanding any provisions contained in any Act of Parliament, royal charter, deed of settlement, contract of copartnery, cost-book regulations, letters-patent, or other instrument constituting or regulating the company.

The new Sale of Food and Drugs Act.—The object of the statute to amend the Sale of Food and Drugs Act, 1875, which has just been printed, is to explain the meaning and effect of section 6 in the recited Act, on which conflicting decisions have been given in England and Scotland. It is now enacted that in any prosecution for the sale of adulterated articles it is to be no defence to allege that the purchaser having bought only for analysis was not prejudiced by such sale. Neither is it to be a good defence to prove that the article, though defective in nature, or in substance, or quality, was not defective in all three respects. An officer, inspector, or constable may obtain a sample of milk at the place of delivery, to submit the same to an analyst. "The seller or consignor, or any person or persons intrusted by him for the time being with the charge of such milk, if he shall refuse to allow such officer, inspector, or constable to take the quantity which such officer, inspector, or constable shall require for the purpose of analysis, shall be liable to a penalty not exceeding £10." Any street or open place is to come within the meaning of the 17th section of the

principal Act. In determining where an offence has been committed under the 6th section of the Act, 1875, a reduction is to be allowed to the extent of twenty-five degrees under proof for brandy, whisky, or rum, and thirty-five degrees for gin. Every liberty having a separate Court of Quarter Sessions, except a liberty of a Cinque Port, is to be deemed to be a county, and Quarter Sessions of boroughs are not to contribute towards the expense of a county analyst. There is a provision as to boroughs with separate police. The last section in the new Act contains a special provision as to prosecutions under the principal Act; and, notwithstanding section 20 of the principal Act, it is now enacted that the summons to appear before the magistrate is to be served upon the person charged within a reasonable time, and, in case of a perishable article, not exceeding twenty-eight days from the purchase. The particulars of the offence and the name of the prosecutors are to be stated in the summons, and the same is not to be made returnable in less than seven days from the service on the person summoned.

Judicial Factors (Scotland) Bill.—The bill brought in by Mr. Ramsay, Mr Baxter, Sir G. Montgomery, and Mr. Dalrymple to "provide for the appointment of judicial factors in Scotland" has been printed. It provides that after 1st January next it will be competent for Sheriffs-Principal and their Substitutes to appoint judicial factors on estates the yearly value of which (including both heritable and movable property) does not exceed £100, and also that it shall be competent to the Court of Session to pass Acts of Sederunt for regulating the manner of appointing such factors, and the manner in which the factors and accountant shall discharge their duties.

At a law school not a hundred miles from New York the professor asked a brilliant youth, on his final examination, what legal principle it was that prevented a woman who had been seduced from bringing action against her seducer. After a moment's hesitation the boy aforesaid answered, "*Contributory negligence.*"

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF PERTH.

Sheriff Barclay.

SCOTT *v.* SCRIMGEOUR.

Conditio indebiti—Wages.—An action was raised in the Sheriff Court of Perth at the instance of George Scott, jun., draper's assistant, Aberfeldy, against

A. & J. Scrimgeour, drapers, Aberfeldy and Crieff, to ordain the defenders to make payment to him (1) of a sum of £150; (2) to deliver a bill or promissory note for £500, from which is deducted the sum of £150; (3) to pay £41, 2s. 9d. of wages due; and (4) to interdict the defenders from indorsing said bill or promissory note. The pursuer entered the service of the defenders on the 1st November 1873, and remained there till 10th October 1878. The defenders alleged that in 1873 their Aberfeldy business was highly remunerative, but since then the profits quickly diminished till February 1878, when the balance then struck showed an apparent loss. As the yearly turn-over was much the same as formerly they became suspicious of the pursuer, and accordingly took various ways and means of testing his honesty. On the 18th October 1878 a marked florin was given to a young man who afterwards called at the defenders' shop and gave it to the pursuer in payment of a small account. Immediately afterwards the defender called the pursuer into the counting-house and requested him to show what money he had in his pockets, and on his producing his cash, the defender recognised and claimed the florin. A. Scrimgeour averred that he then asked the pursuer to inform him how much of the defenders' money he had taken and appropriated to his own uses during the time he had been in their employment, and after numerous calculations with a pencil brought out the high sum of £875, but it was ultimately agreed that the sum taken by the pursuer should be fixed at £500. £150 was paid at once, and acknowledgment of a debt of £350 granted. The pursuer pled that the sum of £150 having been obtained upon false and fraudulent grounds, and his signature having been impetrated from him by unfair means, decree ought to pass as concluded for. The defenders, on the other hand, stated that the pursuer having admitted the taking of £500 of their money, and paid only £150, they are entitled to retain the amount of wages admitted to be due until he settles the balance of £350, and they ought to be assoilzied from the whole of the other conclusions of the action with expenses. Proof was led at great length on the averments. Sheriff Barclay has now issued the following interlocutor:—

"*Perth, July* 18, 1879.—Having heard parties' procurators, and made avizandum with the process, proof, and debate, Finds as matters of fact (1) on the 10th October last (1878) the pursuer placed in the hands of Alex. Scrimgeour, acting for and representing the defenders, a sum of £150 in bank notes; (2) the said sum was not paid as debt due by the pursuer to the defenders, and it is not shown that any such debt or claim of debt was at that time due by the pursuer to the defenders; (3) at the said date, at the request of Alexander Scrimgeour, acting for and representing the defenders, the pursuer subscribed the stamped paper, No. 13 of process, but it is proved that said paper was wholly blank when so subscribed, and the same does not acknowledge any debt, and there is no evidence that any debt was then due by the pursuer to the defenders; (4) the pursuer was for some years a clerk or assistant to the defenders, and during the last year of his service it is admitted that the wages or salary was £80, and the service was mutually terminated as on said 10th October: Finds that there exists no reason for continuation of wages after the said date, and parties having adjusted the claim of wages, and the defenders proving no further payments or accounts than admitted by the pursuer, finds the sum to be allowed under this head to be £35, 17s. 3d. Applying the law to the facts so found, Finds (1) the pursuer having given to or deposited the said sum of £150 in the hands of the defenders, and no payment of debt or claim of existing debt being proved, he is entitled to recover the same; (2) that the piece of blank paper, No. 13, having been the property of the defenders at the time of the pursuer's signature thereto, they are entitled to retain the same: therefore decerns for the sum of £150 aforesaid with interest as concluded for, and for the sum of £35, 17s. 3d., as balance of wages or salary with interest as concluded for, but dismisses the action *quoad ultra*: Finds the defenders liable to the pursuer in the expenses of process, allows an account thereof to be given in, and remits the same when lodged to the auditor of Court to tax and to report, and decerns. HUGH BARCLAY.

"*Note.*—This is a very painful and perplexing case. The action is somewhat of the nature of a *conditio indebiti*, and it therefore may perhaps rest on the pursuer to establish his claim for repetition of the money given to or impounded in the hands of Alex. Scrimgeour as having been given in essential error. But it is proved that the money was not given as payment of a debt. It was given under circumstances of a very peculiar character. The pursuer, a young man, was charged with embezzlement to a great extent, and the cash was lodged by the defenders either as a pledge or security for any balance due on a scrutiny of books or for pursuer's guarantee that he would return or abide investigation. There was no settlement or adjustment of accounts at the time, or even yet, to establish that the £150 was paid to the defenders as in payment of debt. It is monstrous to suppose that the pursuer could, without detection, have committed the abstractions to such an extent. Had there been anything like regular books or even surveillance, such amount of defalcations could not have occurred. The pursuer appears to have enjoyed the entire confidence of his employers. It is not proved that he was of loose habits, or indulged in any gambling or speculations which could have accounted for the sum alleged to have been abstracted. The sum he had in bank is not so great as might have been the accumulation of his salary, seeing that he was boarded with his parents.

"The defenders ought to have gone about the matter with far greater caution, and had witnesses present when dealing with their servant on a matter so extremely delicate. On the other hand, it is impossible to explain the pursuer's conduct in making the jottings admittedly made by him. This, however, if it proves anything, establishes the supreme simplicity, if not agitation, of the young man at the time on the one hand, and the wholly conjectural notion of the masters as to the extent of the fraud which they thought had been committed on them.

"Subscribing the blank stamped sheet of paper throws no small sinister complexion on the object of the cash previously given by the defenders to the pursuer. It shows a desire not only to show the amount of the alleged defalcation, but that the payment of £150 was made to account of that amount. The paper is worthless as a voucher of debt, but the paper is and was the property of the defenders, and was not transferred by them to the pursuer by his adhibiting his signature thereto. The pursuer, therefore, has no right to demand the paper as his property, and the defenders are entitled to retain it for what it may be worth.

"The circumstance of the marked florin is not easily explainable, but even though fully established it cannot throw light upon the large amount of supposed defalcations. The supposed trifling surcharges in accounts are so far explained upon the supposition that the small balances for the accounts entered in the books had been placed in the till.

"With regard to the balance of salary the parties are agreed that it must be held that on the 10th October, from the disagreement which then arose, parties mutually terminated their contract of service, but the pursuer ought to have his salary up to that date. H. B."

Act.—Mitchell.——*Alt.*—Forbes and Whyte.

SHERIFF COURT OF ELGIN.

Sheriffs Smith and Bell.

WRIGHT *v.* STORM AND OTHERS.

Interdict—Common property—Sale.—The interlocutor explains the circumstances of this case :—

"*Elgin, 27th March* 1879.—The Sheriff-Substitute having considered the

cause, Finds that for some time previous to the term of Candlemas 1878 (old style) the pursuer and the five defenders were the crew and joint-owners in equal shares of the fishing-boat Flyaway of Findhorn, and that at or about that time the whole of them agreed to continue to fish together for another year on the same footing: Finds that, in or about the month of October 1878 the defenders proposed to engage a larger boat than the Flyaway in order to enable them to prosecute the fishing at a greater distance from the coast, and that the pursuer refused to join in this proposal, but agreed to allow the defenders to carry it into effect on the understanding that he was to have the use of the Flyaway when she was not required by them: Finds that this arrangement led to a dispute in consequence of both parties wishing to use the Flyaway at the same time, that the defenders resolved that they could not retain the pursuer, who by that time had connected himself with a separate crew, as one of their crew after the expiry of their then current agreement, and that various communications thereafter took place between the defenders and the pursuer with a view to a settlement between them on the footing that the Flyaway was worth £18, and that the defenders were willing to pay to the pursuer his share of that sum and of her earnings, but that no settlement was effected: Finds that the usual practice in the fishing district of Findhorn, when a member of a crew leaves a boat, or otherwise ceases to be a member of the crew, is for the whole crew, including the person so leaving, to meet together on Candlemas Eve (old style), when crews for a white-fishing are usually made up for the ensuing year, and to put up the boat to a sort of auction among themselves; that the highest bid is held to fix the value of the boat, and that the person leaving the crew is paid for his share according to the value so fixed, unless he himself be the highest bidder, in which case he is held to be the purchaser, and then settles with the others on a similar footing: Finds that this practice was well known to the pursuer, that the whole of the present parties met together on the 15th February last, that the Flyaway was then put up to auction among them in the usual way, that the pursuer offered £18 for her, that William Masson, one of the defenders, then offered £19 for her, and that the pursuer not only refused or declined to make any further bid, but declared, or at least acquiesced in a declaration then made by his son William Wright, who was present along with him, to the effect that he, the pursuer, was determined to have the boat sold by public auction: Finds that Masson was then left the highest bidder on behalf of himself and the other defenders: Finds that the defenders are and have been all along willing to pay or account to the pursuer for the value of his share of the boat as so fixed, and that, in accordance with the practice of the community, the pursuer has no farther right to the boat beyond the value so offered or held for his behoof: Finds *separatim*, and according to common law, that in respect of the offer of the defenders to compensate the pursuer for his share of the boat, on a fair and equitable footing, he is not entitled to compel them to expose her for sale by public auction: Therefore, on the whole grounds, assoilzies the defenders under reservation of the claim of the pursuer for his share of the said sum of £19, and of his claim, if any, for the earnings of the boat: Finds the defenders entitled to their expenses, allows an account thereof to be lodged, remits the same to the auditor of Court to tax and to report, and decerns. D. MACLEOD SMITH.

"*Note.*—The practice of the fishing district of Findhorn seems to be sufficiently established and brought home to the knowledge of the pursuer. But in reality the common law on the subject and the local practice are very much the same. It is not an absolute right of any owner of common property, however small his share may be, to force it to a public sale independently of the rights and interest of the others. A public sale is only necessary when there is no other mode of accommodating the matters at issue. But when the sale is opposed, and when there are other equitable modes of estimating and compensating the interests of those who desire to leave, or who cannot remain in the common society, it is quite sufficient that these should be adopted. A man has no proper right beyond that of getting recompense for his interest on a fair

and reasonable footing, and if he get, or is offered, such recompense, he is not entitled to expose other people to trouble, and loss, and inconvenience, in order to gratify his personal caprice or illwill. See Stair's Institutes, 1. 16. 4; Erskine's Institutes, 3. 3. 56; and Bell's Commentaries, 7th edition, volume i. pp. 551, 552.

"In the present case every fairness seems to have been intended on the part of the defenders towards the pursuer. He seems himself to have recognised £18 as the full value of the boat. Notwithstanding this, the defenders agreed to give £19 for it, and they seem to have been willing to give more for the sake of peace. But in vain. The pursuer seems to think that he was entitled to have had a public sale, and he still insists on having a public sale, regardless of the interests of the defenders, and, I suspect, of his own also.

"It was argued for the pursuer that the meeting being on the 15th February, and not on Candlemas Eve (old style), the proceedings were not in accordance with the usual practice of the place. There is really nothing in this objection. The proceedings were substantially the same, and did no prejudice to the interest of any person concerned. But, as already explained, this judgment is founded as much on the common law as on the practice of the place, which seems to be very reasonable and judicious, and in no way inconsistent with the common law. It might occasion intolerable trouble and loss and expense if it were to be held that every dissatisfied or self-willed member of any boat's crew, such as the present, was entitled, whenever he might please, to force his comrades to make a public sale of their boat or boats, instead of having the matter limited among the individual crews, to be controlled by each other in the manner they have hitherto been.

"Even in circumstances in which it might be expedient to expose a ship to public sale, the same considerations might not apply to a boat where the inconvenience and expense of such a course would be so disproportioned to the value of the subject. D. M. S."

The pursuer appealed to the Sheriff-Principal, who issued an interlocutor adhering to the interlocutor of the Sheriff-Substitute. In a note, dated Edinburgh, 5th July 1879, the Sheriff says: "The proceedings may not have been conducted in the precise form most usual among the fishermen of Findhorn. But the pursuer was too much mixed up with them to be at liberty now to set them aside. There is no proof, and scarcely a suggestion, that the value fixed was inadequate. And, being fairly offered his full share, he has no legal title to insist upon getting it *minus* outlay by a judicial sale instead of an equitable transaction."

Act.—Cruickshank.——*Alt.*—Forsyth.

SHERIFF COURT OF LANARKSHIRE.

Sheriffs Clark and Lees.

FINLAY & CO. v. ANBUHL.

Cheque—Failure duly to negotiate—Payment—Bankruptcy of drawee.—The defender in settlement of his account with the pursuers granted them on 27th September, after bank hours, an uncrossed cheque on the City of Glasgow Bank, which held sufficient funds of his to cash the cheque, and got his account discharged. The pursuers on 1st October passed it through their own bank, which the following day passed it through the clearing-house. On that day the City of Glasgow Bank suspended payment. The pursuers then sued the defender for payment of their account or of the cheque. The Sheriff-Substitute pronounced the following interlocutor:—

"*Glasgow, 21st December* 1878.—The Sheriff-Substitute having considered the Finds as matter of fact (1) that the pursuers on the order of the defender d the work and supplied the goods specified between the dates 31st

May and 28th June 1878 in the account sued on, the cost whereof amounts to the sum of £13, 16s. 1d.; (2) that the account therefor, No. 81 of process, having been rendered to the defender, he on the afternoon of 27th September last granted to the pursuers in payment of said account an uncrossed cheque, dated 28th September 1878, on the Crosshill branch of the City of Glasgow Bank, for the sum of £13, 10s., payable to the pursuers or their order, and also paid to them the sum of 5s. in cash, and was allowed 1s. 1d. of discount; (3) that the amount of the said account being thus met, the defender received from the pursuers a duly stamped discharge thereof in the following terms: 'September 27, 1878.—By cash, *pro* John Finlay & Co., A. N. Gilmour;' (4) that the pursuers did not at any time try to cash said cheque at the bank on which it was drawn, but on 1st October negotiated it with their own bankers, the Royal Bank of Scotland, who on the following day passed the cheque through the clearing-house, on the morning of which latter day, however, the City of Glasgow Bank had suspended payment; (5) that the defender, at the time when he granted the cheque, had an account current with the City of Glasgow Bank, and still has a sum much more than sufficient to meet said cheque, and that he is not a shareholder of the bank: Finds in these circumstances as matter of law (1) that as regards the cost of the work and the goods above mentioned, the pursuers are barred by the receipt they granted to the defender from claiming payment thereof from him; (2) that as regards the cheque, the pursuers have, on the grounds set forth in this action, no claim against the defender, seeing that their inability to obtain present payment of the contents of the cheque is due solely to their own failure duly to negotiate it: Finds, as regards the remaining items in the account sued on, that the defender has never refused payment of them, finds him therefore liable to the pursuers in the sum of £1, 14s., with the legal interest thereon from the date hereof till payment; *quoad ultra* assoilzies him from the conclusions of the action, and decerns: Finds him entitled to expenses, etc. J. M. LEES.

"*Note.*—A merchant is not bound to take payment of his account by cheque, but in most circumstances he will do so. When he does he ought for his own sake to qualify the receipt by the use of the words 'by cheque;' and in this way he will escape the risk of having to prove (perhaps by the oath of his debtor) that the payment was not in cash, but by cheque, and will be able, on showing that the cheque was dishonoured without fault on his part, to sue his customer for the goods supplied. Here, however, the difficulty does not arise; for though the receipt granted to the defender is for payment 'by cash,' he admits that part of the account was paid by the cheque produced in process.

"The cheque was not granted till after bank hours on the 27th of September, which led the defender (needlessly) to postdate it as of the following day. The 28th was a Saturday, and the pursuers having no other banking business to do that day did not cash the cheque. Nor did they do so on the following Monday, nor even on the Tuesday, but on the latter day passed it through their own bankers, who, acting as their agents, on the following day, namely, Wednesday, passed it through the clearing-house. On that very day, however, the drawees having become insolvent had suspended payment.

"Eventually, it is probable, the cheque will prove of value for the amount it contains; but it is possible it may not, or before it does, the drawer may become insolvent. The question raised by this case therefore is, On whom is the inconvenience of deferred payment or the risk of loss to fall?

"On the day the cheque was granted, and for three lawful days thereafter, it was value for the sum it bore. What, then, was the duty of the pursuers on receipt of this cheque? The point has never been, so far as I can find, the subject of decision in the Courts of Scotland; but viewing the question in the basis of principle, and in the light of the English decisions, there is, I think, little difficulty in disposing of it. A cheque is simply a bill of exchange payable to bearer on demand, and the rule of law is, that such a bill must be presented within a reasonable time. And such a reasonable time is in general understood to be before the close of the day after that on which it is received.

"The drawee (that is, the person on whom the order is granted) may be, and in this case was, in embarrassed circumstances. The interest therefore of a drawer is to obtain immediate payment from his debtor of the sum owing to him. Delay means risk and probable loss. But if the payee of a cheque (that is, the person who is to receive the contents of it) defers cashing it, it is evident that he prolongs the risk of the drawer of the cheque, and that the latter has no means whereby he can cut short or lessen the risk he is running. Hence, for the drawer's sake, it is the duty of the person to whom the cheque is granted to cash it without delay. If, for his own convenience, or from neglect, he defers cashing the cheque, it would be contrary to all principles of justice if the drawer was to be held liable for the act of the payee.

"Mr. Thomson in the standard Treatise on Bills of Exchange says (p. 119) that 'bank cheques do not require to be presented within any specified time. . . . . If, however, the drawer have lost by the delay (as by the banker's intervening insolvency with the funds of the drawer in his possession), the payee loses recourse on the cheque if he have taken an unreasonable time to present it. What in this case is an unreasonable time has hitherto not been decided in Scotland. In England it has been held that the payee has till the end of the banking hours on the day next after receiving the cheque to present it.'

"The point has been the subject of frequent decision in the English courts. In *Boddington* v. *Schlencker* (1 N. and M. 541) it was held that the holder of a cheque is bound to present it for payment on the day following that on which he receives it. See also *Moule* v. *Brown*, 4 N. C. 266; and *Rickford* v. *Ridge*, 2 Camp. 537. See also the following treatises, in which the law of the above decisions is stated to be the law of England; Byles on Bills, p. 19; Grant on the Law of Bankers and Banking, pp. 50, 51; Roscoe's Digest of the Law of Evidence at Nisi Prius, 12th ed., p. 369; Roscoe on Bills, pp. 9, 156, and 157; and Johnston on Bills of Exchange, p. 54. In the case of *Alexander* v. *Birchfield* (7 M. and G. 1061) the stringency of the rule is well exemplified. The narrative of the case is thus given in the rubric: 'The plaintiffs sold horses to the defendant on the 10th of March 1840, and in payment the defendant gave a cheque on his bankers which the plaintiffs crossed on their own bankers and paid into them on the 11th of the same month. The defendant's bankers did not use the clearing-house in Lombard Street, and accordingly the plaintiffs presented that cheque to the defendant's bankers on the 12th, whereas otherwise they would have presented it at the clearing-house on the evening of the 11th. The defendant's bankers had stopped payment on the 12th :—*Held*, that the bankers of the plaintiffs had acted in strict accordance with the rules of mercantile law, but that the plaintiffs themselves had been guilty of laches' (*i.e.* neglect) 'in not paying the cheque to their bankers on the 10th, if they received it within banking hours.'

"I am not to be understood as saying that in every case a cheque *must* be negotiated before the end of the day after which it is received. If the receiver of the cheque is satisfied of the solvency of the person who granted it, he is entitled, if he chooses, to delay cashing it for six years; and, if the granter is not prejudiced by the delay, the holder of the cheque is entitled at any period within that time to claim the contents of the cheque. But by such delay he may run risk. The bankers may fail, and if so the loss will fall upon the holder of the cheque, and not upon the person who granted it, if at the time it was granted the banker had funds sufficient to meet the cheque. In this case the cheque was not crossed, and therefore the pursuers were not bound (though they were entitled) to present it at their own bank. And I think the decisions of the English courts seem to justify the principle that where a person cashes an uncrossed cheque at his own bankers, the latter are entitled to an additional day before the cheque be presented at the bankers of the person who granted it. There may be special cases in which some delay on the part of the holder of the cheque in cashing it will not be held unjustifiable. But it will be in-[illegible]t on him to show the existence of such circumstances, and in this case [illegible]h are shown.

"In conclusion I would advert to the argument urged for the pursuers, that they have no claim under the cheque on the bank, and that, in any event, the defender might defeat it by uplifting all the money he has in the bank when he gets the opportunity. Even if I could say that the pursuers possess no claim on the bank, and if the defender did what they fear, the pursuers would not be barred by the foregoing interlocutor from suing the defender on the cheque. In this action they sue him on the account, and I have held that owing to the discharge they granted and to their delay in cashing the cheque they cannot do so. They also sue on the cheque itself, and as regards it, I have held that their delay has been fatal to any direct claim under it. But if the defender eventually defeated their claim in the manner specified, that would be fraud, and they would have an action against him in respect of such fraud.

J. M. L."

On appeal the Sheriff adhered.
Act.—Maclachlan.——*Alt.*—Frame.

SMALL DEBT COURT OF BANFFSHIRE.

Sheriff Scott Moncrieff.

TOWN OF BANFF *v.* BARTLETT AND MILNE.

Petty customs — Proof of usage—Meaning of term "Market."—The Sheriff-Substitute pronounced the following judgment, August 19, 1879 :—

"In these cases the magistrates of the royal burgh of Banff seek to recover from the defenders, who are butchers in Banff, certain sums alleged to be due as petty customs for beef and mutton sold by them in their private shops from November 1869 to January 1879. The present 'table of petty customs to be exacted by the burgh of Banff' is framed in terms of a local Act of Parliament (3 & 4 Vict. c. 114), and the portion of it which bears upon the question now raised is as follows :—

"'For each sheep (mutton) brought into the market for sale by burgesses or persons paying scot and lot to the burgh, twopence.'

"'For each beef brought in as above, threepence.'

"'For shamble dues and for weighing the hide of each beef brought in as above, fourpence.'

"There is also a provision to the effect that strangers (that is, as I understand it, those who do not pay scot and lot to the burgh) are to be charged one-half more upon the above articles.

"This Act of Parliament was obtained in the year 1840, and judging from the preamble, one object which it was to effect was the definition of ill-defined and understood petty customs. In so far, however, as butcher-meat is concerned, the only difference between the table already quoted annexed to the Act, and that which had been in use since at least the year 1822, consists in the introduction of the word 'mutton' after sheep.

"The defenders decline to pay custom upon beef and mutton, because, as they allege, these articles are not brought into *the market* by them, but sold in their private shops. They have ceased to pay since 1869, but they have regularly supplied the pursuers with a note of the carcasses disposed of by them, and they have continued to pay shamble dues.

"It was contended on behalf of the magistrates that the question could be disposed of in their favour upon the mere construction of the schedule apart from any evidence. On the other hand it was also maintained that the Act should alone be looked to, it being with equal confidence argued that its terms excluded shops and freed the defenders from all liability for the sums sued for. After hearing parties it appeared to me that the expression 'market' was just one which might have its meaning restricted or extended according to the

evidence of usage adduced, and that therefore the proper course was to allow a proof. Taking the expression by itself, apart from the fact that in everything relating to petty customs usage must be kept in view, I should have been disposed to read the word 'market' as excluding private shops. I am aware of the case of *Martin and Others* v. *The Magistrates of Aberdeen* (February 25, 1801, F. C.), in which a similar question was decided in favour of the magistrates, it being observed 'that the right to exact petty customs is part of the original constitution of all the royal burghs in Scotland. It cannot signify whether the commodity be sold in the public market or in shops, nor in what shape it is exposed.' But looking to a subsequent decision in the House of Lords (*Fleshers* v. *Magistrates of Edinburgh*, January 22, 1802, 4 Pat. Appeals, 375), I have grave doubts whether *Martin's* case can now be looked upon as an authority. It is hardly necessary to quote cases in support of the view which I took that usage might interpret the meaning of an expression, but I may refer to that of *Scott* v. *Wilson* (February 4, 1829, 5 Murray, 52), where although the grant of customs authorized the collection of dues at fairs and markets, evidence was led to show that these dues were collected in shops on other than market-days as well as in the market, and in the opinion of the presiding judge a usage established with regard to one article not sold in the public market. Evidence in the present case has now been led at great length, and without going into details, I think it has been satisfactorily established by the pursuers that for a period of about forty years prior to 1869 butchers' shops or stalls more or less distinct from the public market-place have existed in Banff, that the custom now claimed has during that period been exacted without any distinction being made between shops and the market-place, and that the present objection was unheard of until raised by the defenders in 1869. Further, that since 1869 down to the present time this custom has apparently been exacted from all the butchers' shops in the town with the exception of the defenders, who, however, have continued to pay the shamble dues which under the schedule are exigible upon beef brought into the market. It was contended by the defenders that the period over which the usage to be proved can extend must be held to stop in 1869, when the defenders first declined to pay. I do not think this argument well founded. I think the magistrates are entitled to prove that the interruption to the practice in 1869 was caused by the act of the defenders alone; that since that time all the other butchers have paid as they paid before, and that the defenders themselves have continued to pay their shamble dues, although the right to exact them seems also to depend on the construction of this term 'market.' The question to be determined is what does 'market' mean in connection with the dues on butcher-meat levied in this burgh, and surely it is relevant to prove that up to the date of these actions the majority of the inhabitants concerned gave it a certain meaning, or acquiesced in that meaning being put upon it. Upon this point I would refer to the cases of the *Magistrates of Linlithgow* v. *Mitchell and Others* (June 21, 1822, 1 Shaw, 515), and *Magistrates of Campbeltown* v. *Galbreath* (February 21, 1845, 7 D. 482), which seem to establish that in cases of this sort it is unnecessary to prove the fullest exercise of the right challenged, or that the duty has been exacted from every one liable. I may also observe that although the magistrates have taken ten years to bring these actions (and I pronounce no opinion upon the expediency of the course followed), still I think there is evidence that they have never during this period abandoned their claim against the defenders; for they have regularly obtained from them the information necessary to frame the accounts sued for, a tolerable indication of what their intention ultimately to do was. Taking this view, it is perhaps unnecessary for me to inquire whether or not in 1863 a solitary individual did or did not take the objection to this custom which is now so vigorously urged. In that year the magistrates raised an action against a butcher of the name of Scott, who in his defences pleaded in a general way that the pursuers had no title to sue. That he intended to raise the present objection certainly does not appear from his pleadings, while it is clear that he had others of quite a different

nature. The action was compromised, and it is vain to speculate about a possible line of defence which may have been discussed in lawyers' chambers but was never revealed to the pursuers.

"It is maintained by the defenders that proof of usage prior to 1840 must be excluded. I think I must be held to have already decided this point against the defenders when I allowed the proof in these actions, seeing that an immemorial usage can hardly be said to have sprung up in thirty-nine years, although no contemptible period of time. But is there any good reason why the Act of Parliament should be held as an interruption of the usage? Although one of its objects was to define ill-defined customs, it did not define the expression 'market.' The schedule in this respect continued the same after 1840 as before, and butchers continued to pay in their private shops. The Act seems to have countenanced an existing custom, viz. dues upon beef and mutton brought into the market, and it is still competent to determine from the usage what this expression 'market' may mean. It cannot surely for a moment be maintained that if the magistrates had in 1840 acquired a right by immemorial usage to exact customs from shops as forming part of the market, there was anything in the Act to take away that right. The pursuers can hardly be expected, however, to go back for a period of eighty years. Their evidence ranges over half a century, and I do not think we can look for more from them.

"There is reason to believe from the evidence that the expression 'market' is understood in a more restricted sense in the case of other commodities upon which dues may be exacted under this schedule, and that with reference to them a distinction between private shops and the market-place is recognised. But the defenders cannot show that anything is being demanded from them which other butchers are not called upon to pay. How butchers alone came to be followed by the tacksman into their private shops may be a curious inquiry, but is hardly relevant. It has already been decided 'that the Court will not review or alter an immemorially established mode of assessment of a town tax on an allegation that as a general rule of taxation it is unequal and unjust in its operations, while the party complaining admits that the rule of assessment has been applied to him in the same manner as to the other inhabitants' (*Gibson* v. *Thomson & Craig*, 13th November 1810, F. C.). Now every inhabitant carrying on the trade of a butcher in Banff is taxed, as the pursuers say the defenders should be; nor would butchers pay less because other traders were called upon to pay more. Besides, although the magistrates may have, by failure to exact, lost the right to certain customs, it does not follow that they cannot demand the present one, which they have so steadily exacted for many years.

"I am therefore of opinion that the pursuers have established a right to exact the custom claimed from the defenders. The correctness of the accounts sued for is not disputed, the defences raised solely this question of law. Had the pursuers by their conduct during the past ten years led the defenders to imagine that the present claims were not to be insisted in, I should have had difficulty in giving decree for the arrears sought. But in the circumstances I think the defenders have had quite sufficient notice all along that these claims were not abandoned; and as they have suffered no loss, but, on the contrary, gained the interest of their money, I see no reason why they should not now pay up the full amount.

"At the same time I am prepared to modify the expenses. The pursuers failed to satisfy me that they had a *prima facie* title. They have had to establish it by evidence, and it is not unreasonable that they should pay some portion of that expense entailed in doing so."

Notes of English, American, and Colonial Cases.

RAILWAY COMPANY.—*Passenger's season ticket—Forfeiture of deposit for breach of conditions—Delivery of ticket on expiry.*—Upon purchasing a passenger's season ticket from the defendants, the plaintiff agreed to be bound by certain conditions, of which one was that all benefit of the ticket, including a deposit of ten shillings paid with the price, should be forfeited on breach of any of the conditions; and another condition was that the ticket should be delivered up on the day after expiry. The plaintiff did not deliver up the ticket on the day after expiry, but delivered it up within a time which was found upon the trial to be a reasonable time. The defendants refused to return the deposit: —*Held*, that the defendants were justified, on the ground that compliance by the plaintiff with the stipulations of the contract was a condition precedent to his right to a return of the deposit.—*Cooper* v. *The London, Brighton, and South Coast Railway Company*, 48 L. J. Rep. Exch. 434.

COPYRIGHT.—*Trade-mark—Title "Post-Office" Directory.*—The plaintiff was the registered proprietor under the Copyright Act of a directory entitled "The Post-Office Directory of the West Riding of Yorkshire," which included the town of Bradford; and since 1852 had published directories for various other country districts, which were all entitled "Post-Office" directories. The defendants being about to publish a directory for the town of Bradford entitled "The Bradford Post-Office Directory," but which bore no similarity to the work of the plaintiff in price or appearance, the plaintiff claimed to restrain the defendants from using the word "post-office" as part of the title of their directory:—*Held*, that the plaintiff had no right to the exclusive use of the word "post-office" as part of the title of a directory for Bradford, either under the Copyright Act, or regarding the use of the word as a property in the nature of a trade-mark, and the action was dismissed.—*Kelly* v. *Byles*, 48 L. J. Rep. Chanc. 567.

RAILWAY COMPANY.—*Working agreement—Effect of words "work and maintain"—Right of exclusive possession by working company—Maintenance.*—The A. railway company were by an Act of Parliament authorized to construct a railway, and by a working agreement scheduled to and made part of the Act the B. railway company were empowered on certain terms to "work and maintain" the same in perpetuity. The line was accordingly constructed by the A. company and worked by the B. company. The A. company subsequently erected certain steps as an improved access to one of their stations, and these steps were removed by the B. company. In an action by the A. company for a mandatory injunction for the restoration of the steps and for an injunction to restrain any further interference therewith,—*Held*, that the effect of the working agreement was to entitle the B. company to the exclusive possession of the railway and works for the purpose of working and maintaining the same, that the erection of the steps was properly a work of maintenance, that the A. company had no right to enter upon the railway and works for the purpose of erecting the steps, and that the action must be dismissed with costs. The meaning of the term "maintenance" as applied to a railway discussed.—*The Sevenoaks, Tunbridge, and Maidstone Rail. Co.* v. *The London, Chatham, and Dover Rail. Co.*, 48 L. J. Rep. Chanc. 513.

HUSBAND AND WIFE.—*Equity to a settlement—Lunatic—Maintenance.*—The wife of a person of unsound mind was entitled to a fund in Court. An order was made in enforcement of her equity to a settlement, directing accumulations and future income to be paid to her separate use, with liberty to apply in chambers for the disposal of capital in a similar manner.—*Re Dixon's Trusts*, 48 L. J. Rep. Chanc. 592.

SHIPPING.—*General average contribution—Practice of average-adjusters.*—The plaintiffs' ship sailed from S. in America to L. in England with a general cargo, and encountered severe weather, in consequence of which a general average sacrifice was made by cutting away the foretopmast, the fall of which occasioned further damage to the vessel, which was thereby compelled to put into C. to repair, in order to enable her to prosecute the voyage. To repair the vessel it became necessary to unship a portion of the cargo, and expenses were incurred in landing, warehousing, and reshipping it. Further expenses were also incurred on account of pilotage and other charges on the ship leaving the port in order to proceed on her voyage. The vessel completed her voyage and discharged her cargo at L. The plaintiffs, as shipowners, claimed contribution according to English law by way of general average, from the defendants, the owners of the cargo, in respect not only of the expense of entering the port and of discharging the cargo, but also that of warehousing and reshipping the latter, as well as in respect of expenses incurred in the way of port charges and pilotage on the occasion of the vessel again putting to sea. The defendants admitted their liability to contribute up to the discharge of the cargo, but denied any liability beyond that stage, relying on what was admitted to have been the practice, for from seventy to eighty years, of British average-adjusters in adjusting losses, according to which the expense of warehousing the cargo had been treated as particular average on the cargo, and the expense of the reshipment, pilotage, port charges, and other expenses incurred, to enable the ship to proceed on her voyage, as particular average on the freight. The charter-party and bill of lading were silent on the subject:—*Held* (by Cockburn, L.C.J., and Mellor, J., *dissentiente* Manisty, J.), that the plaintiffs were entitled to have brought into general average the expense incurred in the warehousing and reshipment of the cargo, and the pilotage, port charges, and other expenses, on the ship leaving the port in order to proceed on her voyage to L.; also that the usage of the average-adjusters, being inconsistent with law, could not prevail, the parties not having expressly agreed to make such usage a part of the contract.—*Attwood* v. *Sellar*, 48 L. J. Rep. Q. B. 465.

BOTTOMRY BOND.—*Loss of ship by a collision—Limitation of liability action—Right of bondholder to freight recovered from a wrong-doing vessel.*—Where a bottomry bond on freight has been given, and the ship by which the freight is to be carried is lost in a collision with another ship, from which the owners of the first ship recover in a limitation of liability action instituted by the wrong-doing shipowners, among other damages a sum in respect of freight, the bondholder is entitled to receive from the shipowners recovering the damages such an amount of freight as equals the sum lent by the bond, or a proportional amount according to the amount of freight recovered.—*The Empusa*, P., D. & A. 36.

CHARTER-PARTY.—*Perils of the seas—Deviation to save property—Liability of shipowners.*—The owners of cargo are entitled to recover against the shipowners the value of the cargo under a charter-party which contained the usual exception in case of accident from "perils of the seas," where the cargo had been lost at sea in consequence of the ship stranding, after deviating from her proper and usual course in the endeavour to save another ship and cargo in imminent danger from perils of the sea, inasmuch as the exception did not extend to such a case.—*Scaramanga & Company* v. *Stamp*, C. P. 478.

There is an implied contract in all charter-parties which have no express stipulation on the subject, that the master of the ship will not deviate unnecessarily from the usual and proper course, but that he may do so when it is reasonably necessary in order to save human life, but this last exception does not allow of a deviation to save a cargo and ship in imminent danger where the saving of life does not require it, and does not, therefore, exonerate the owner of such ship from liability to the owner of cargo carried by such ship, for a loss subsequent to such deviation, though there was no negligence in the master, and the loss was not caused by the deviation.—*Ibid.*

EXECUTOR.—*Scottish assets of Scottish testator—Scottish domicile—General administration—Jurisdiction.*—The executors of a testator, whose domicile was Scottish, and whose property was mainly in Scotland, but some portion of whose personalty was in England, proved his will in Scotland, and afterwards took out probate in England in the ordinary general form. One of the executors then commenced an action in England against his co-executors for general administration of the personal estate, which was opposed on the ground, first, that the action was unnecessary; second, that at any rate the decree should be limited to the assets in England:—*Held*, that the plaintiff was entitled to the ordinary administration decree without restriction.—*Stirling-Maxwell* v. *Cartwright* (App.), 48 L. J. Rep. Chanc. 562.

BANKERS.—*Conversion—Crossed cheques—Protection to collecting banker—"Not negotiable"—Forged indorsement.*—By section 12 of the Crossed Cheques Act, 1876 (39 & 40 Vict. c. 81), it is enacted, "a person taking a cheque crossed generally or specially bearing in either case the words 'not negotiable,' shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had. But a banker, who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself, shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment:"—*Held*, that the cheque mentioned in the latter part of that section is not limited to the cheque described in the former part as one bearing upon it the words "not negotiable," and that, therefore, a banker, who in good faith and without negligence in due course of collection receives payment for a customer of a cheque crossed generally, but having a forged indorsement, is protected by such 12th section from liability to the true owner of the cheque for having placed the amount of such payment to the credit of his customer, notwithstanding such cheque has not the words "not negotiable" upon it.—*Matthiessen & Another* v. *The London and County Banking Company*, 48 L. J. Rep. C. P. 529.

COPYRIGHT.—*Musical composition—Sole liberty of performing—Entries on Register.*—The statute 5 & 6 Vict. c. 45, s. 20, applies the provisions of 3 & 4 Will. IV. c. 15, s. 1, to musical compositions, and 5 & 6 Vict. c. 45, applies therefore to the right of performing musical compositions published within ten years before the passing of that Act. C. assigned by deed in 1843 to D. his copyright in certain songs which had been composed by him in 1836 and registered in 1841, and also the sole liberty of printing and publishing the same, "together with the sole and exclusive privilege of vending the same and all other his estate, right and title, interest, property, contingent possibility, benefit, claim and demand whatsoever, both at law and in equity," in those compositions:—*Held*, that after the 5 & 6 Vict. c. 45, the author had two distinct rights in these songs, the copyright and the sole right of representation or performing, and these words in the deed passed both the copyright and the sole liberty of performing the songs. C. afterwards assigned to A. the exclusive right of performing the same songs, and A. made entries on the Register at Stationers' Hall, representing himself as proprietor, under that assignment, of that right. H., claiming title under the earlier assignment to D., moved to expunge these entries:—*Held* (affirming the judgment of the Queen's Bench Division), that H. was a person "aggrieved" within the meaning of section 14 of 5 & 6 Vict. c. 45, and that the entries must be expunged.—*Ex parte Hutchings and Romer; re the songs "Kathleen Mavourneen" and "Dermot Astore,"* 48 L. J. Rep. (App.), Q. B. 505.

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THE PAPACY CONSIDERED IN RELATION TO INTERNATIONAL LAW. By ERNEST NYS, Docteur en Droit.

THIS learned and able essay appeared originally in French, as an article in the *Revue de Droit International* (tome x. 1878, Nos. IV. à VI.). In its English form it is dedicated to Sir Robert Phillimore, the venerable Judge of the High Court of Admiralty, and it has met with a more cordial welcome in England than is usually given to the works of Continental jurists. In politics, both lay and ecclesiastical, M. Nys belongs to the Conservative-Liberal party, now happily in the ascendant in Belgium; and he consequently treats his subject in a spirit which, without being in any degree hostile to Christianity or even to Catholicism, is strongly opposed to Ultramontanism. He views the matter, indeed, simply as an international jurist, and in this capacity the question which he puts to himself is, Has the Papacy, now that its temporal power is gone, and it is no longer a State in the secular sense, still an international *status?* "Constituted as it is, a supposed spiritual power, deprived of all real and effective sovereignty, can it enjoy a primordial prerogative of sovereign states?" The question, as he says, assuredly deserves to be examined, for "it is impossible to ignore the influence which yet in our days the Papacy exercises on the march of civilization." There are no less than sixteen states which still maintain diplomatic relations with the Vatican. Austria-Hungary, Spain, France, and Portugal have each an ambassador at Rome; Bavaria, Belgium, Bolivia, Brazil, Ecuador, Chili, Guatemala, Monaco, the Republic of Nicaragua, Peru, and the Republic of San Salvador maintain a minister plenipotentiary. Germany has retained a Chancellor, and although Holland has no minister accredited to the Holy See, an internuncio is resident at the Hague. Notwithstanding the diplomatic recognition thus widely accorded to it, M. Nys takes

for granted at the outset, that the Papacy, as now constituted, cannot claim the international rights of a state in the ordinary sense, on the simple ground that it cannot discharge the international duties of a state. If the Papacy is a state at all, it is a disembodied state; and M. Nys is consequently safe in limiting his inquiry to the question, "whether it is allowable to admit that the Papacy possesses a sovereignty *sui generis*, which gives it the right of legation and treaty?" But in thus limiting its area, M. Nys increases at once the depth and the interest of the discussion; for the question is at once forced upon him, "whether the conception of an outward Church is a conception truly Christian?" "In antiquity," he says, "even had the science of international law existed, the situation of a pretended spiritual power could not have found a place among its objects. In reality the very idea of such a power did not exist. Religion was above all national; the political community included the spiritual, and the *jus sacrum* was merely a division of the *jus publicum*. To the pagan idea Jesus opposed the idea of the separation of the two domains, spiritual and temporal; and by the side of the earthly kingdom He proclaimed the heavenly kingdom, into which all those might enter who acknowledged Him to be the Messiah, who followed His precepts, and laboured, like Him, to the glory of His Father. The new religion was born."[1] Here M. Nys enters upon dangerous ground; and the hesitation with which he has trod it has caused an apparent antagonism between the principles which he has established and the conclusion at which he arrives, an antagonism which is not removed by the statement that "logic is a bad counsellor in politics."[2] Bad logic is a bad counsellor in politics, no doubt, for both the logic and the politics sooner or later will assuredly come to grief; but sound logic is a counsellor to whose monitions the deafest utilitarian, like the most scatter-brained enthusiast, must listen in the end; and woe to the policy that attempts to run away from its warning voice. It is not M. Nys's logic, however, but his theology that has misled him. His error, as it appears to us, consists in recognising the separation between the earthly and the heavenly kingdom as a fundamentally Christian idea. It was the Church and not Christ that separated earth from heaven, and divorced the body from the soul. That there are isolated phrases ascribed to our Lord, which, in the forms in which they have come to us, and when separated from their context, countenance a distinction, which beyond all others has been the stronghold of priestcraft, not in the Christian Church alone, but in every other, is unquestionable. But the whole scope and tenor of Christ's teaching was to maintain the closest union between the two spheres—the very object of His mission was to bring them together; and it is in their separation that Ultramontanism in Catholic countries, and evangelical fanaticism in Protestant

[1] P. 6. [2] P. 55.

countries, find their stronghold. Separate the heavenly from the earthly kingdom, and you separate priest from people, Sunday from Saturday, Church from State, religion from morality, and give rise to the notion that bad men may be good Christians. In treating of the new theory introduced, or rather we should say the old theory revived, by the Reformation, M. Nys himself has brought out this point with great force and clearness in words which, for another purpose, I have already quoted elsewhere.[1] "The Reformation finished the destruction of the work of the middle ages. In Protestant countries it took from the Church the base of her domination, by putting an end to the dualism of life, to the hostility of body and of soul, of spiritual and temporal life. In politics it broke down the false unity of Catholicism by recognising the principle of individual and national sovereignty. The superiority of the priest over the layman was overthrown; spiritual power was no more; each nation was to be sovereign, and the sovereignty should extend to things spiritual as well as to things temporal; the priesthood was to be no longer either outside of the State nor above the State, but was to be within the State."[2] Here *rem acu tetigit;* and we wonder that M. Nys did not see that he had in his hand the practical as well as the theoretical solution of his question. The Church, like the priesthood, is not *outside of the State nor above the State, but within the State.* Nationally, and, as a necessary consequence, internationally, they are one; and in representing the State diplomatically, you represent the Church also. A State without a Church is a body without a soul; and should the doctrine of recognition in the progress of international jurisprudence receive more accurate definition, the question, whether or not the separation between Church and State as a measure of domestic policy diminishes the value of the State as an object of international recognition, will inevitably arise. But a Church without a State is a soul without a body, and positive law, whether national or international, being bounded in its action by the conditions of physical existence, cannot deal with disembodied entities. It can no more recognise a Church when regarded simply as a bundle of dogmas, than it can recognise any single dogma of which such a Church is composed. It can no more recognise the Roman Catholic Church than it can recognise the infallibility of the Pope, or the doctrine of transubstantiation, or purgatory, or eternal damnation. A Church in the abstract, then, can have no international status, and no national Church, that is to say, no *Established* national Church, will ever demand it. I make this latter reservation because we know from experience that the moment a Protestant Church is disestablished it immediately begins to claim an outward existence for itself. Its priesthood assert a quasi-political position independent of the State to which they belong, and it is with a view to this assertion that we must explain so singular a phenomenon as that of the leaders of the

[1] A National Church demands a National Liturgy, p. 9. [2] P. 29.

Free Church party in Scotland shaking hands with the Ultramontanists, in their mutual acceptance of the separation of the heavenly from the earthly kingdom, and of the Church from the State. But this mutual agreement, though plain to others, is not acknowledged by either party; and the Roman Catholic Church is very far from acknowledging that it stands internationally in the same position with the national Churches, whether established or disestablished. That its historical position in this respect is one altogether special to it is abundantly shown by the brilliant sketch of its diplomatic history and organization with which M. Nys has presented his readers. But whatever may have been the effect of the universality to which the Roman Catholic Church lays claim in times past, does this claim, even as against those who acknowledge it, found a further claim to separate international recognition? Far from it. I have elsewhere explained the grounds on which I hold that the exclusive character of the Koran deprives not only it, but all states founded on its anti-social doctrines, from admission into the society of nations. Recognition is essentially the acceptance, not as I hold it of equality, but certainly of co-ordination, amongst recognised and recognising states. Its first maxim is live and let live; its second, live and help to live. Does the Papacy satisfy these requirements? "Gregory VII. personifies the Papacy. It will therefore be of use to examine his doctrines more closely. The primordial idea is well known. According to the Catholic view there are in man two distinct and hostile elements—the soul and the body. Now, in the organization of society what represents the soul? The Church. And what represents the body? Lay society. The life of lay society, the State, is not then the true life, and humanity cannot gain salvation without submitting to the direction of the Church."[1] Then listen to the bull *Unam Sanctam:* "We learn by the Gospel that in this Church and under his power are two swords, the spiritual and the temporal; the one should be employed by the Church and by the hand of the Pontiff, the other by the Church and by the hand of the kings and of the warriors by order and permission of the Pontiff. Now it is necessary that the one sword should be subject to the other, that the temporal power be subject to the spiritual; otherwise they will not be ordered, and they ought to be as the apostle says. According to the testimony of truth the spiritual power ought to inspire the temporal power, and to judge it if it go astray. Thus is verified in respect to the Church the prophecy of Jeremiah, '*I have established thee over the nations and the kingdoms.*' But if the Church has the right of judging kings, God alone can judge the spiritual power. Then whoever resists the Church resists God. To deny that princes are subject to the Church is to admit two principles, like the Manicheans." The conclusion is that it is necessary to salvation that every human creature be subject to the Pope:

[1] P. 13.

"*Porro subesse Romano Pontifici omni humanæ creaturæ declaramus, definimus et pronunciamus omnino esse de necessitate salutis.*"[1]

The last of these precious documents which M. Nys cites is the bull *In Cœna Domini*, to which Pope Urban VII. gave the finishing touches. In this form, M. Nys tells us, it "ought to serve as an eternal law to Christendom, and above all to bishops penitentiaries and confessors, who ought in the confessional to engrave it deeply on the hearts of all. It excommunicates and curses all heretics and schismatics, all who give them shelter, who favour or defend them; and consequently all princes and magistrates who authorize heretics to sojourn in their States. It excommunicates and curses all those who, without the permission of the Pope, keep or print the books of heretics, all those who appeal from the decisions of Rome to a future general council, whether they be individuals, universities, or other corporations. It intermeddles with the autonomy of the State, and interferes with the right of the State to raise imposts, establish tolls, and exercise justice."[2]

It is true that this monstrous proclamation excited the indignation of the civil authorities in every Catholic State, and that no Catholic State now acts upon, or in its civil capacity recognises, the terrible doctrines which it sets forth. It is on this ground that the Roman Catholic States of Europe are entitled to international recognition by the Protestant States, both of which, on all the principles of international law, ought, in my opinion, to withhold recognition from Mahometan States which profess and act on the principles of the Koran. But the Church herself professes them as of yore, nay, as the recent proclamation of infallibility showed, professes them with greater confidence than ever, and would doubtless act upon them too if she dared. In what respect, then, does the Roman Catholic Church, as a Church, differ in principle from the Ottoman Porte as a State; and what hope is there that, consistently with the independence of political communities, her international recognition could ever be permitted to attain any reality, or to prove anything but a sham, like the nominal recognition of Turkey under the Treaty of Paris?

I am quite alive to the difficulty in which Roman Catholic States are placed by the historical traditions of the Church of Rome, and the influence which her priesthood still exercise. To break off diplomatic relations with her suddenly may in some cases be impossible, and in many cases would certainly be unwise. But in place of further extending, or more formally recognising her claims to an international *status*, the true course for all States which, like Belgium, desire to be amongst the leaders of civilization, is gradually to shake themselves loose from her trammels, and as soon as possible to refuse to her any international recognition apart from the States with which she is locally connected. I must

[1] P. 19. [2] P. 20.

consequently dissent from M. Nys's opinion, when he says that "it is at Rome itself that the governments, taking advantage of the centralization of Catholicism, ought to operate; instead of confining themselves to defend on their own territory their rights of sovereignty, they ought to try to lead the Papacy to ideas which would be less in contradiction with the spirit of progress and of liberty; and from this point of view a representation of the great Powers at the See of Rome may be of great utility."[1] To lead the Papacy to ideas which would be less in contradiction with the spirit of progress and of liberty I believe to be impossible, for the simple reason that such ideas would be in contradiction with the Papacy itself. A reform of Catholicism is as great an impossibility as M. Nys has himself justly pronounced to be the appearance of a new religion. But the dogmatic slough of all religions may fall off and leave a kernel of universal acceptability. The principles proclaimed by Christ in the Sermon on the Mount are the very principles which lie at the root both of national and international jurisprudence; and towards these principles there is every reason to hope that the national Churches of Christendom will tend, so soon as the links which bind them to the Papacy are broken, and those which bind them to their local sovereigns are more firmly tied. A national Church of Belgium, founded on the universal principles of Christianity, which are not at variance with the principles of universal humanity, and are thus Catholic in a far higher sense than ever was the Church of Rome, is not, we should hope, an impossibility, nay, in the minds and hearts of some of the leading members of the Liberal party, is, we have good reason to believe, already an actual existence. Its external realization may not perhaps be attainable by the existing generation; but their influence in determining its character will be great, and, come when it may, when we contrast the sweet and wholesome aspect of the rural peasantry who have grown up under the influences of Catholicism, with the squalor, wretchedness, disease, and vice of the manufacturing populations who in Belgium, as everywhere else, have been nurtured on Materialism, Nihilism, and Socialism, we cannot suppress the hope that the National Church may not depart very far from the old lines. The Church of England is the best example of a National Church in Europe, and this just for the reason that, amongst Reformed Churches, it is that which broke least with the previous life of the nation, and partook least of the character of an ecclesiastical revolution.

J. LORIMER.

[1] P. 58.

THE LEGAL POSITION OF ACCUSED PERSONS.

"No doubt, Chiffie," said the King. "His Grace and you will be excellent judges in each other's cause, and as good witnesses in each other's favour. But to investigate the matter impartially, we must examine our evidence apart."—*Peveril of the Peak.*

In the last number of this Journal the question of the examination of accused persons was treated from the point of view that, as the law at present stands, they are not competent or compellable to be witnesses for or against themselves, and it was maintained that this state of the law is not consistent with the ends of justice.

It is proposed in this paper to consider the other side of the question.

In doing this it cannot be admitted that it is a correct definition of the present state of the law to say that it excludes the evidence of an accused person on his own behalf.

The first step in the ordinary course of criminal proceedings, when an accused person is brought before a magistrate for examination, is to inform him that he is not bound to answer any questions unless he pleases. But the very object of the examination is to elicit his statements and explanations in regard to the charge against him. If he choose to answer the questions put to him on that subject, he is equally welcome, in addition to his answers, to make any further statement or to give any explanation that he may think proper; and it is the duty of the presiding magistrate to cause whatever may be so stated or explained to be taken down as part of the written judicial declaration or record of the proceedings.

The functions of the magistrate on such an occasion are wholly judicial and disinterested, and it is as much his duty to release the prisoner, if no adequate proof or suspicion appears to be against him, as it is his duty to detain him if there is.

The functions of the procurators-fiscal, since they have come to be paid by salaries, are nearly as judicial and disinterested as those of the magistrates.

Besides the magistrate and procurator-fiscal, the sheriff-clerk, or his depute or clerk, who writes the declaration, and who are equally neutral and disinterested, must be present in addition to the declaration witnesses.

In such circumstances anything like undue pressure or unfair treatment of an accused person under examination, even if there could be any motive for such a thing, common to so many official persons all independent of each other, is practically impossible. Without going farther back, it may be enough to say that, within the experience of the present generation, there has not been any charge or even any colourable suspicion of anything of the kind.

It has been said that the accused should have the benefit or assistance of a law agent at his examination, and that the public should be present on such occasions.

It should be remembered, in reference to this, that the judicial examination is merely a preliminary step at which it is desirable to get the statements of the accused, if he choose to give them of his own accord, as to his own personal knowledge of the facts with which he is said to be implicated. It is obviously desirable that such statement should be got before he should have any opportunity of communicating with other persons. The same observation applies to the question of his having the assistance of a law agent. The accused is not either under interrogation or upon his defence as to any point of law. He is merely asked as to simple facts, as to which he has no more occasion for the advice of a law agent, or of any other person, than a witness in the witness-box has occasion for such advice. Another reason for secrecy is that, according to our system, and according to every rational system of law that can appreciate the principle of the famous precedent of Susanna and the elders, not to speak of the ordinary experience of common sense, it is considered of the utmost importance that, as far as possible, no witness, before his own examination at the trial, should have any opportunity of knowing anything either of the statements of the accused or of any of the other witnesses.

No person should be detained longer than is necessary for the purposes of the preliminary examination, and no person can be detained longer than eight days, as an accused person, unless he is committed for trial on a definite charge or charges. That is done if a strong *prima facie* case arises against him as the result of the preliminary investigations. On the other hand, if no such case appear on the face of the declaration and precognitions, the accused person is at once released without further trouble or exposure; and he has his legal remedies against the person or persons who made the charge against him, or who caused his apprehension, if their conduct was in any way malicious or unjustifiable. It is as much the duty of the procurator-fiscal to avoid unnecessary detention or inconvenience to any person except those believed to be incriminated, as it is to secure the conviction of the guilty. There is no procurator-fiscal in Scotland who would not feel insulted if he were supposed to act on any other footing.

This course of procedure does not contrast unfavourably with the practice of public preliminary examinations on the other side of the Border, often protracted and continued from day to day, like a sort of rehearsal of the trial, conducted by any person, with not only no provision for the separation of the witnesses, but with every facility for their dressing up their stories to suit each other, if they are so disposed, and for diverting attention from the real criminal, and sometimes involving an innocent person, if it should be their interest to do so. To an onlooker, accustomed to a superior system, the whole affair seems scandalous, and the recently disclosed cases of Galley, Habron, Dobbs, and Scampton confirm the worst views of it. The well-written article under the head of "Public Prosecutor"

in "Chambers's Encyclopedia," which fully discusses this subject, is not nearly so well known as it ought to be. The new Act authorizing the appointment of a director of prosecutions for England is a step in the right direction, but it does not go nearly far enough.

The allegation that the law of Scotland excludes the evidence of an accused person on his own behalf is not admissible or consistent with fact, if it be meant by that allegation that anything that can be stated or explained or urged by or on behalf of the accused does not receive as complete effect as if such statement or explanation were made or given by him on oath through the witness-box. It receives even more effect, because no case is considered complete or sufficient to warrant conviction in the eyes of the public prosecutor, or of the Court or the jury, unless every statement made by or on behalf of the accused, in whatever shape it may be made, and every reasonable ground of innocence that can be suggested by himself or others, is negatived by the legal evidence for the prosecution. In this way the barest statements or explanations made by or on behalf of the accused, although not perhaps falling under the technical denomination of evidence, are entertained on a much higher footing than that of the testimony of any individual witness. The evidence of an individual witness may or may not be true, or may want corroboration, or may be left out of view. On the other hand, the statements or explanations made by the accused, or on his behalf, must be satisfactorily proved to be untrue or incredible, otherwise there can be no verdict against him. The rhetorical appeals so frequently made to juries, on the assumed ground that the law is so unreasonable as to shut the mouth of the accused as to so-called points on which he and he alone can give information, has no basis whatever except the colourable inference arising from the fact that the accused is not actually put into the witness-box. No person's mouth is really shut. The accused can state or explain everything that it is for his interest to explain through the mouth of his counsel. If he does not choose to have counsel, he can state or explain everything he has to state or explain through his own mouth. In neither case is there room to complain that his statements or explanations are excluded, and if he should choose of his own accord to make an appeal to the Deity as to the truth of his asseverations, it is not easy to see how he could be prevented, although the latter step would not probably make any practical difference as to the result in regard either to the impression on the jury or to the substantial merits of the question of his guilt or innocence. It would not be even an absolute novelty, but, according to ordinary experience, statements in such circumstances are more readily accepted according to their intrinsic probability rather than according to the strength of assertion with which they are put forward.

There are other reasons against the proposed change. It cannot

be intended to compel an accused person to give evidence against himself. But it would be a singular anomaly to put a person in the witness-box to testify in his own favour, and at the same time to be protected from cross-examination as to the subject-matter of his testimony. Such a spectacle is hardly one that can be contemplated by any practical lawyer. It might also lead to most difficult and painful and protracted complications, more especially in regard to charges for higher crimes.

It is made matter of further complaint that the prosecutor cannot be compelled to adduce the pursuer's declaration in evidence. This is a very thin grievance, and a purely formal one. It can hardly be supposed that any judicious prosecutor would seek to withhold from the accused the benefit, if any, of his judicial declaration. If he should, there is a perfect remedy in the power of the accused himself. The declaration is lodged with the clerk before the trial so as to enable the accused to take a copy of it if he pleases. It is also lying on the table at the trial, and the accused or his counsel is entitled at his own hand to read it, or to state the contents of it, to the jury from beginning to end, and to comment on them at their pleasure, if either of them think proper to do so.

If these views be sound, there is no substantial ground for the present agitation. If, on the other hand, the contention be well founded to any extent, that accused persons are tried and condemned with their mouths shut against them as to the facts within their knowledge, every trial that has ever taken place, or that may continue to take place under such a system, is a manifest outrage on justice and humanity. This at all events is the logical consequence of the argument, and if it is not consistent with observation and experience that our ordinary criminal procedure is of that nature, it is to be apprehended that there is some flaw in the premises which lead to such an induction. It has been attempted to be shown that the flaw consists in the contention in question being practically devoid of any substantial foundation.

The law of Scotland may have many points requiring amendment, but this does not appear to be one of them. To say that our criminal system, without any pressure or coercion on the accused, is effective in discovering and convicting guilty persons is its highest praise. It is not easy to see that it can ever be too effective in that direction. If, however, it tended in any way to convict innocent persons it would be its greatest condemnation, but our criminal annals, at least within the period of the present generation and much farther back, are entirely free even from the supposition of anything of the kind.

S.

LORD YOUNG ON DEFORCEMENT.

THE report of a case at the Inverness Circuit, which we give elsewhere, is a valuable contribution to the law of deforcement of an officer of the law in the execution of his duty. We trust that it will find its way into the authoritative reports, as our report is necessarily unrevised by the Judge.

Still enough appears from our report to justify a few remarks on Lord Young's exposition of the law as it bears on the duties of Sheriffs and Sheriffs-Substitute in such cases.

It is plain from the report that the Sheriff (the Sheriff-Substitute in the present case, as appears from the indictment) omitted to ask the prisoner, when emitting his declaration on the criminal charge, whether he was then willing to surrender himself for imprisonment on the civil warrant for debt. Had this question been answered in the affirmative, the Sheriff should have arrested the criminal proceedings and handed the prisoner over to the officer present to be imprisoned as a civil debtor. The question of further criminal proceedings could be resumed at any time the Sheriff or Sheriff-Substitute might think proper. If this course had been followed in the Inverness case it would have tallied with Lord Young's views, and effected the enforcement of the civil warrant, and admitted of the suitable punishment of the prisoner for his previous irregular and violent proceedings.

Had, however, the prisoner declined to surrender himself for imprisonment on the civil warrant, the declinature would have strengthened the criminal charge and almost excluded Lord Young's cynical remark as to the officer's feeling "alarmed or affronted—his Lordship could not say which." Every right-feeling man will have his own opinion of such a remark from the Bench, in view of the fact that the prisoner had pled unhesitatingly guilty to the charge of deforcement contained in an indictment which stated that the officer and his assistant were put in bodily terror by the prisoner's conduct, so much so that Lord Young subsequently characterized his conduct as "irregular and violent." Officers of the law in their unpleasant and, we may add, under-paid duties, should not meet with unnecessary discouragement.

The declinature to surrender would undoubtedly have led to committal for trial, a step which entitled the prisoner to claim liberation on bail, a right which the indictment in the Inverness case shows that the prisoner had claimed and obtained. Being thus free once more, Lord Young not unnaturally asked the creditor's agent why he had not of new enforced the civil warrant. The answer that he could not enforce the warrant because "it had been in the hands of the fiscal ever since" was obviously unsatisfactory, as on application the creditor was entitled to get it up for

this purpose on an obligation to return it, if within his power, for any after criminal proceedings.

Lord Young has for the first time authoritatively announced that besides this right in the creditor the Sheriff and Sheriff-Substitute has a duty to discharge which was neglected in that case. That duty is, if the creditor does not use his warrant, for the Sheriff himself to see to its immediate enforcement in vindication of the law's authority. "How the warrant had not been at once enforced, instead of being now delayed some four or five months, was simply incomprehensible. The Sheriff had neglected his duty," were his Lordship's forcible remarks. It is not to be supposed that after such remarks a similar neglect will occur.

It is obvious that if the prisoner had both declined to surrender in his declaration, and not been liberated on bail, then no other course was open but to detain him in prison until the criminal proceedings terminated. It was this distinction which the Sheriff, or more properly the Sheriff-Substitute, failed to see.

But the case was reported to Crown counsel, and they likewise seem to have failed to see it. Why then, it may be asked, did Lord Young not deal equal justice by them instead of implicating them? However, his Lordship carefully excluded any notice of any such interference being competent, although one of their number was present as Advocate-Depute at his bar. His Lordship remarked that he "could not understand how the Sheriff had not at once proceeded to vindicate the law by enforcing the warrant, but he [the Sheriff] seemed to have thought it right to examine the prisoner on this charge and send him here." This must be accepted as the explanation of the course adopted by Lord Young in ignoring Crown counsel, and as a correct statement where the responsibility of trial as well as all the other previous procedure rests. This position has already been vindicated in these pages, in the late series of articles on the Procurator-Fiscal, a series which, on public grounds, we hope will shortly be resumed and concluded.

The object of instituting a trial for deforcement of a sheriff officer is to show that the law must be obeyed. And however foolish it was for this Caithness farmer, as Lord Young remarked, to think that he would ultimately succeed in defying its strong arm, yet by the procedure adopted he obtained virtual immunity from arrest for four or five months. But while this individual may chuckle over the miscarriage of justice which here occurred, it is matter of congratulation in the interests of public justice that Lord Young has so clearly brought out where the miscarriage lies. Next to exposing the source of an evil is the privilege of indicating how the evil is to be avoided in future. The latter has been our humble province. The adoption of our suggestions will, it is to be hoped, show, should such resistance to law be continued, that it can and must be put down with the strong hand; and when to this is added promptitude in the law's retributive action, a great object

will have been, though unintentionally, achieved by the Inverness prosecution, with its otherwise paltry result of a fine of forty shillings or one month's imprisonment.

MAILLS AND DUTIES.

It must frequently have occurred to students of Scottish law that, even in departments of law which have received a tolerably full illustration in the decisions of the Court, there is often a striking and somewhat perplexing absence of decisions fixing the general and elementary principles which the whole superstructure of law is seen to rest upon. Whether this is an inconvenience to which other legal systems are to any extent exposed we are not in a position to say, but some of the causes of the phenomenon in our own system are not very far to seek. In England principles of law are inseparably associated with leading cases, and when you have a principle thus exhibited in the concrete, it is difficult to extend its force beyond the particular set of general legal conditions to which it has been originally applied.[1] A problem in property law may be solved by the application of a perfectly pure and abstract principle which in its own nature may with as much propriety be applied to relations arising in widely different departments of law. But, as generations of lawyers appear and disappear, the case, which is really not more than the instance or illustration of the principle, becomes invested with the positive authority of law; its authority is confined to what may be called its own general, not special, facts; and attention is diverted from the true range and general application of the principle. In Scotland, on the other hand, we have escaped the slavish worship of case-law, but the escape has been to the cost (it is difficult to conceive a greater cost) of precision and definiteness in our law. A great many of our principles we have drawn in the shape of vague brocards and maxims from a variety of sources; and though round most of these a group of technical meanings has been clustered in the course of time, and though undoubtedly the construction put by the Supreme Court upon such a maxim would be binding on inferior courts and on itself, there still remains an undesirable vagueness, which, however useful an instrument for the expansion of law in the hands of strong judges, leaves the certainty of the law too much at the discretion of the Bench.

These observations were suggested by the inquiry recently made with regard to the rights of a heritable creditor in competition with a trustee in bankruptcy. The particular right of the heritable creditor in question was the right to bring an action of maills and duties. The position of matters here is one that must constantly

[1] This is well brought out in the Report of the Criminal Code Bill Commission, pp. 10, 11.

occur. The form of security is the most common of all, and the remedy is one frequently resorted to. It is therefore somewhat surprising that apparently no definite authority can be found for preferring the right of either the creditor or the trustee.

Most of the cases on this subject will be found to turn more or less on particular words used in the bankruptcy statutes of the period defining the effect which is to be given to sequestration, or reserving particular rights which sequestration on the view of the common law might have cut off. In *Falside's Trustee* v. *Walker* (March 4, 1815, F.C.) the heritable creditor was not in possession at the date of sequestration, and after that date the interest of the debt was allowed by the trustee to fall into arrear. The creditor therefore sued for maills and duties. Lord Alloway "found that a heritable creditor, especially one who has not received payment of his interest for several years, is entitled to enter into possession of the lands over which his security extends by process of maills and duties: Finds that the Act of Parliament authorizing sequestration does not deprive a heritable creditor, secured by infeftment, of his real right to the estate, nor of the ordinary process for securing his right; on the contrary, all his rights by the bankrupt statute are reserved entire." The argument for the creditor in that case was that while the policy of the bankrupt statute prohibited personal creditors from using diligence to make preferences, this did not apply to the case of a creditor whose preference was already fixed by infeftment, and who could merely hasten payment of his debt. The old Act of 1793 reserved the whole powers available to a creditor at common law, except that of bringing the estate to judicial sale, and that is taken away only where the trustee has previously brought a sale. The argument of the trustee, on the other hand, was that by the statute the whole estate was vested in the trustee for behoof of the creditors, that all separate diligence was thereby stopped, and that as the heritable creditor was not previously in possession he could not oust the trustee from his management by a process of maills and duties. The statute was founded on by the trustee for the purpose of showing that the creditor required its authority to sell, even when the trustee had not previously sold, or a majority of the creditors had not previously determined on a voluntary sale. It was further argued that at common law the effect of sequestration was to stop diligence, the statute being construed by reference to the common law; and the estate being *in manibus curiæ*, it could not be taken away by a creditor's action. There is no report of the opinions of the Court in deciding in this case, but they unanimously and "without hesitation" took the view of the trustee and recalled Lord Alloway's judgment. There had been considerable delay on the part of the trustee in recovering the estate, and the Court instructed him to proceed without delay. It is difficult to estimate the precise value of this decision. We are

accustomed in more modern times to treat sequestration as entirely the creature of statute. If this view be correct, then no rights are lost which are not either expressly taken away by the language of the Act under which sequestration is awarded, or are necessarily inconsistent with that language; and there can be no common law (in the improper sense of law which is not statutory) applicable to the case. Lately, in the discussions relating to the liquidation of the City of Glasgow Bank, we have heard a good deal about the point of time after which the *status quo* must be preserved. The questions there raised, however, concerned the possibility of transferring shares from one person to another, and the challenge by action of an existing contract of partnership. The effect of sequestration upon preferable rights which require completed diligence for their effective realisation is a very different question. It is now of course impossible to say whether, in deciding *Walker's* case, the Court went on the statute or the common law. If the latter, and if it is still permitted to decide sequestration questions by common law, and if there is a common law of sequestration, then the question would remain whether the existing Bankruptcy Act of 1856 leaves the right of the heritable creditor where the Act of 1793 left it. One statute may interfere with the common law to a greater or less extent than another. If, on the other hand, the Court proceeded on the statute, the same question would have to be considered, but the decision might then be regarded as an implied authority against the application of supposed common law rules to such questions. In one sense, of course, the Court must have proceeded on both the statute and the common law. That is to say, they must in either view have adopted a certain construction of the statute. But, rejecting the argument of the trustee from the powers expressly reserved to heritable creditors, they may have applied a general rule that after sequestration no diligence is to be used. Or they may have inferred from the statute itself that everything not specially reserved to heritable creditors was by force of statute taken from them. It would appear from a recent work on Practice[1] that in the opinion of the profession the case of *Walker* is regarded as laying down a universal rule independent of the terms of particular sequestration statutes. "A trustee in bankruptcy has a preferable title to a creditor in an action of maills and duties raised after the date of sequestration." It may be thought that the case of *Walker* goes further than this. Not only is the interference of the creditor excluded as against the statutory management of the trustee (even where considerable delay has taken place), but apparently (although this is wholly opposed to the general conception of the security afforded by the assignation to rents in a bond on which infeftment has followed) the rents collected by the trustee will disappear into the general estate, over which the security of the heritable creditor does not

[1] Mackay, Practice of the Court of Session, ii. p. 311.

extend. This at least is the necessary result of reasoning from the assumption that, *quoad* the rents, the security is not completed against the trustee, but requires the assertion of the right of possession in some way, as by an action of maills and duties.

Passing over the intermediate statutes, we proceed to consider the provisions of the Bankruptcy (Scotland) Act, 1856. By section 102 of that statute the Act and warrant in favour of the trustee is declared *ipso jure* to transfer to and vest in the trustee for behoof of the creditors the whole property of the bankrupt, and particularly the whole heritable estate, as if a decree of adjudication in implement of sale had been pronounced in favour of the trustee, and this decree had been recorded at the date of sequestration, and as if a poinding of the ground had then been executed, but subject to such preferable securities as then existed, and subject to the creditors' right to poind the ground, as afterwards provided by the Act; the right of the trustee not being challengeable on the ground of any prior inhibition, the effect of which is, however, declared to be saved in the ranking of creditors. By section 4 of the statute the word "security" is defined to include securities, heritable or moveable, and rights of lien, retention, or preference. By section 107 the sequestration is again declared to be equivalent to a decree of adjudication of the bankrupt's heritable estates; and by section 108 it is declared to be equivalent to an arrestment in execution and decree of furthcoming and to an executed or completed poinding; no arrestment or poinding executed after the sixtieth day before sequestration being effectual. Section 112 declares that a heritable creditor may sell in terms of his security notwithstanding the sequestration, although it is probable that a trustee, making a case of substantial injury to the estate, could interdict a sale (see Beveridge, 17th January 1829). Under section 114 the creditors at the meeting held after the examination, or at any other meeting called for the purpose (which implies notice to the heritable creditor), may resolve to sell the heritable estate, and in that case the heritable creditor, if he has not himself commenced proceedings to sell, or has unduly delayed them, is not entitled to interfere. The important section for our present purpose, however, is the 118th, which provides that no poinding not followed by a sale within sixty days before sequestration, and no decree of maills and duties, on which a charge has not been given within the same period, shall be available against the trustee except to the limited effect provided by the same section. The exception is that a heritable creditor may poind and take a decree of maills and duties after sequestration, but the diligence so taken is to avail for the current half-year's interest on the debt and for arrears of interest for one year immediately before the term. The leading decision on this 118th section (which is now repealed) is *Budge* v. *Brown's Trustees* (12th July 1872, 10 Macph. 958). In that case the creditor raised his action of maills

and duties eighty-six days, and obtaining his decree, entered into possession sixty-five days, before sequestration. The decree was not extracted, however, till within fifty days of sequestration, and therefore no charge could have been given beyond the period of sixty days. After the creditor had been some years in possession the trustee challenged his right to uplift the rents except in terms of section 118. The creditor argued that he was entitled to continue his possession by virtue of his recorded bond, assignation to rents, and the possession he had obtained. The First Division of the Court, however, affirming the judgment of Lord Ormidale, enforced the limitations of section 118. No other result was possible, but the decision created a good deal of consternation among heritable creditors at the time, the provisions of the statute having to a large extent been overlooked in practice. In delivering judgment, Lord Kinloch observed: "I think it cannot be doubted that the right to the rents on the part of such a creditor is constituted by his bond and infeftment. It has been sometimes said that the effect of the infeftment is to operate an intimation of the assignation in the bond." His Lordship points out that this is misleading. The creditor's right is that of encumbrancer, not proprietor, so that any one uplifting the rents is not taking the creditor's property, and is not bound to restore it. The owner may of course uplift them, or his personal creditor might arrest and draw them under a decree of furthcoming. In these cases the heritable creditor will have no right to reclaim them. He requires to make his right effectual by decree of maills and duties, or if the rents are *in medio*, he may judicially appear and claim them. "But if the creditor has once raised his summons of maills and duties, no one can come into effectual competition with the right created by his bond and infeftment." Again he says: "I think it necessarily follows that the raising a summons of maills and duties at any time anterior to the date of sequestration will preserve the creditor's right of preference over the rents. It will do so by virtue of the principle that such a step maintains the preference created by the bond and infeftment over every assignation or diligence not carried into full completion by appropriation of the rents. There might be more difficulty as to a maills and duties raised after sequestration in respect of the strong vesting clauses in favour of the trustee—a question not necessary to be considered. But I think it beyond all doubt that, independently of special provision, the raising of a summons of maills and duties the very day before sequestration would be sufficient to give the heritable creditor a right to the rents then due, and to all accruing afterwards, to the exclusion of the trustee in the sequestration." Accordingly the construction which Lord Kinloch puts on section 118 of the Bankruptcy Act is that it was "intended to limit the preference otherwise competent to the heritable creditor. Independently of such a provision, the creditor would carry off the rents from the

trustee by a maills and duties raised at any time anterior to sequestration." In fact the only alternative interpretation of the 118th section which it had been found possible to urge seriously in *Budge's* case was the absurd one that the heritable creditor might enter into possession by maills and duties to the extent of drawing interest for one year and a half from the rents, all further demands being made against the trustee. Obviously, if the creditor's right be strong enough to break the trustee's possession at all, the right may be continuously maintained until satisfaction of the debt. Lord Kinloch adds that there can be no doubt that, in spite of section 118, the heritable creditor is entitled on a sale to take his whole debt, including arrears of interest, out of the first end of the price. He describes the policy of the statute as throwing the heritable creditor on the capital of the property, while the personal creditors participate in the rents, or perhaps in urging the heritable creditor to exercise as soon as possible his power of sale. The opinion of Lord Kinloch, assented to by the Lord President and Lord Ardmillan, is no doubt the leading opinion in the case, but in the opinion of Lord Deas there is an important difference of expression. After explaining that the creditor has a real right against the whole property (including rents) for the whole debt (including interest), he adds that undoubtedly diligence is required to make that right effectual for the interest against the rents or beneficial use of the property. The only cases in which a heritable creditor had been preferred to an arresting creditor were those in which it was still possible for the heritable creditor to use such diligence, and in which therefore his right was recognised to avoid circuity of process. But Lord Deas makes this very definite statement, which may be contrasted with the doubts suggested to Lord Kinloch's mind by the vesting clauses of the statute: "The Bankruptcy Act, 1856, does not take away the right of a heritable creditor to resort to an action of maills and duties, or a poinding of the ground, *either before or after sequestration* has been awarded." It must be admitted that, if the common law contains no decisive doctrine on the subject, and if the form of heritable security does not of itself supply the elements of a decision, the opinion of Lord Deas on the construction of the statute seems the preferable one. The statute in its 118th section first excludes all "maills and duties" on which no charge has been given sixty days before sequestration, and then proceeds to give a limited effect to all such actions, although the decree is obtained after the sequestration. The words of the section are, "Provided that no creditor . . . shall be prevented from executing a poinding of the ground or obtaining a decree of maills and duties after the sequestration." These words certainly do not suggest that, for the limited effects defined by the section, an action of maills and duties might not have been *begun*, as well as decree taken, *after* the sequestration. But if it was the law that a heritable creditor could not raise such

an action, then surely some notice must have been taken of this in section 118. For while the statute may properly enough have been intended to save the vested interests of creditors who had *begun* diligence before sequestration, it will be observed that there is absolutely no limit of time beyond which the power of creditors to execute poindings and to obtain decrees of maills and duties is to cease, while, on the other hand, the diligences which are in the first place excluded by the statute are all those not completed by a certain period before the sequestration. It may be said that section 118 recognises a right to raise diligence after sequestration, and so it was understood in practice.[1] The words used are sufficiently comprehensive for this purpose, and if any limitation was intended it was not only appropriate, but necessary, to express it.

By the Conveyancing Act, 1874, section 55, the 118th section of the Bankruptcy Act, 1856, is repealed, and with regard to the past it is declared that all heritable creditors "who have been in possession under their securities, and whose right to the rents collected by them has not been challenged by action previous to the commencement of this Act, shall be entitled to retain and apply all rents collected by them in the same manner as they might have done" if section 118 had never been enacted. There can be little doubt what is the effect of this repeal. The diligences which section 118 excluded from competition with the trustee (except to a limited statutory effect) are now to receive their natural effect, that is to say, where they are used by creditors having preferable rights to the trustee. This is perfectly clear with regard to diligences completed within the sixty days prior to sequestration. It would seem almost equally clear with regard to diligences obtained after sequestration by preferable creditors. No case has occurred since 1874 with regard to the right to bring an action of maills and duties after sequestration. But the kindred, and indeed scarcely distinguishable, case of poinding the ground has been the subject of consideration in the case of *Royal Bank* v. *Bain* (July 6, 1877, 6 Rettie, 985). In that case the preferable heritable creditor had executed a poinding after the date of the sequestration but prior to the confirmation of the trustee. It was held that his rights against the trustee were regulated by the vesting clause of the statute of 1856 (section 102) and by common law, and that his right was to take the poinded moveables. The judgment was by the First Division affirming that of Lord Adam. The Lord Ordinary explains that according to the case of *Campbell's Trustees* (13 Shaw, 237), decided before the Bankrupt Act of 1839, the heritable creditor, coming in between sequestration and confirmation, was entitled to be preferred to the trustee subsequently confirmed. This common law preference being thought too prejudicial to the interests of personal creditors, it was limited in the same way by section 95 of the Bankruptcy Act of 1839, and section 118 of the Bankruptcy Act of 1856.

[1] See *Johnston* v. *Budge*, 8 Sc. L. R. 381.

It was argued for the trustee in *Bain's* case that as section 118 contained the only express restriction in favour of the poinding creditor of the trustee's right under the vesting clause, the repeal of section 118 left the trustee's right without restriction. The result would be that diligence prior to sequestration would exclude the trustee, but that no diligence, though by preferable creditors, would be available after the sequestration. Lord Adam observes that this would be a very reasonable state of the law, but he adopts the view (clearly enough indicated in *Barstow* v. *Mowbray*, 18 D. 866, a decision on the Act of 1839) that a preferable security existed at the date of sequestration which the creditor might afterwards assert, and that this preferable security was reserved to the creditor by the vesting clause. The reason of this common law preference is, as stated by Lord Deas in *Bain's* case, that creditors in *debita fundi* are (with the favoured exception of those whose real debts arise by act of law) preferable according to the dates, not of their diligences, but of their real rights.[1] Hence, as the trustee is only the successor to the real right of the debtor who granted the security, the right of the heritable creditor is necessarily preferable to that of the trustee. Lord Deas refers to the fact that the earlier bankruptcy statutes had made no alteration on this common law preference, or any limitation in the amount to be recovered. It was, of course, necessary, according to the doctrine of *Hay* v. *Marshall* (3 Shaw, 157, and 2 W. & S. 71), that the creditor must actually seize the moveables by the execution of a poinding before they are sold and removed by the trustee. With reference to section 118 of the Act 1856, Lord Deas observes that "the prior heritable creditor is recognised as holding a security preferable to the right of the trustee, and which may be made available by a poinding of the ground after the date of the sequestration."

It may be thought that the reasoning which has been applied to the case of poinding of the ground is also applicable to the case of a maills and duties. There may be no distinct authority to the effect that maills and duties follow the same rules with regard to preference depending on infeftment, but the principles laid down by Lord Kinloch in the case of *Budge* very much resemble what is said of the remedy against the rents in the case of *Bain*. The two remedies are always dealt with together in the bankruptcy statutes, and are of course affected in precisely the same way by the vesting clause and its sub-clause of reservation. It would appear, however, that Mr. Mackay is of a different opinion, for in his work already cited, commenting on section 55 of the Conveyancing Act, 1874, he says, "The common law rule is therefore now restored, and possession under a decree of maills and duties, prior to sequestration, is now effectual in a question with the trustee." This is not quite accurately put, for the prior decree always had

[1] See note by Lord Mackenzie in *Bell* v. *Cadell*, 10 Shaw, 100.

effect, though by statute its effect was limited. He proceeds to say, "Perhaps even the raising of a summons of maills and duties would have that effect."[1] And for this doubt he refers to the conflicting opinions already noticed of Lords Deas and Kinloch in *Walker's* case. Lord Kinloch's opinion, however, was to the effect that the raising of a summons prior to sequestration was undoubtedly sufficient to preserve the preference of the creditor. Lord Deas intimated that possibly, or probably, a summons raised after sequestration would have the same effect. Again, Mr. Mackay says, "But if the action is raised after sequestration, expenses cannot be recovered from the trustee." This is somewhat misleading, for of course if, as the previous passages imply, the action must at least be raised, if not decree obtained, prior to sequestration, then the question of expenses could not arise in an action brought after sequestration, and therefore unavailing and incompetent. Taken as it stands, this passage suggests that such an action may competently be brought after sequestration, for then only could the question of expenses arise. And the case referred to (*Johnston* v. *Budge*, 25th February 1871, 8 Sc. L. R. 381) is undoubtedly a case in which such an action was competently brought, and rents recovered by the creditor, although he did not get his expenses, because the trustee did not object to the decree he craved. But then that case was under section 118 of the Bankruptcy Act, 1856, which is now repealed.

CITY BANK APPEALS.

NO. II.

THE true point, his Lordship thought, turned upon three clauses in the deed of copartnery of the City of Glasgow Bank, those clauses being the 4th, 5th, and 6th, which were in the following terms:—

"4. The parties do hereby bind themselves respectively to contribute and pay when required the sums of money corresponding to the number of shares of the said stock subscribed by them, as the same are specified in the testing clause of these presents, and are likewise *in majorem evidentiam* adjected to their signatures, and which several sums of money are held to be herein repeated.

"5. The said partners shall have right to the profits and be liable for the losses, and bound to relieve each other of all the debts and engagements, of the company in the proportion of their respective interests or shares in the said capital stock, declaring that the whole capital stock and profits of the company, as well as the said parties and the aforesaid individually, shall be bound and obliged to free and relieve the governor and deputy-governor of the company elected or to be elected as after mentioned, in the event of

[1] Practice of the Court of Session, ii. p. 312.

either of them not becoming parties thereto, of all liability for the debts and engagements of the company.

"6. Any person holding a share of the said capital stock, whether as an assumed subscriber or as a purchaser, heir, or other representative of such subscribers, shall be entitled to all the rights and subject to all the liabilities of an original partner of the said company."

Lord Hatherley then noticed the fact that the great banks in Scotland were truly vast partnerships, and partook of the character of partnerships in the rights conferred upon the shareholders and in the liabilities to which they became subject, the test and touchstone being the shares themselves. "Whosoever," he added, "at any given time, be it for profit or be it for loss, finds his name attached to the ownership of a given number of shares, that person has to deal with those shares as provided by the articles of the partnership deed—namely, to contribute to the loss and share in the profit in proportion to the number of shares that he holds." In one case quoted, namely, that of *Gordon* v. *Campbell* (Feb. 21, 1840, 2 D. 639; 1 Bell, App. 428), the bargain between the parties, who were all in a position to make such conditions as they chose, gave power to any person who acted as trustee to say that he did so act in that capacity only, but here from the clauses of the deed the learned judge pointed out that any one could, on the original footing alone, become a shareholder. It was not, and could not be in the power of the directors to make a new contract with a shareholder or alter the existing one; for the deed gave them no authority in dealing with the shares to manipulate them in such a way as to produce different classes among the shares, some of which, as regards their liability, would, in event of loss, be found guarded in a manner "contrary to the express stipulations of the deed." On this same branch of the case Lord Penzance said: "To exonerate a trustee something more is necessary beyond the knowledge of those who deal with him that he is acting in that capacity, and it would not be sufficient in all cases to state that fact on the face of any contracts he may make. To exonerate him it would be necessary to show that upon a proper interpretation of any contract he had made, viewed as a whole—in its language, its incidents, and its subject-matters—the intention of the parties to that contract was apparent, that his personal liability should be excluded, and that although he was a contracting party to the obligation the creditors should look to the trust estate alone."

Lord Blackburn also observed that he had no doubt of the prudence of persons contracting as trustees making a stipulation that they were to be bound merely to see the due application of the trust funds in fulfilment of the contract; and further, that if this were done in a sufficiently clear manner and accepted, both parties being *sui juris*, it would be binding on the other contracting party as a good limitation of liability in favour of the trustees. But

here we see that as regards any such contract the bank at all events was not in the position of being *sui juris* as represented in the persons of its directors, for they were acting in the administration of a certain express contract, and were absolutely bound by its conditions, which prohibited their allowing of any such limitations of liability.

The learned Lords in the House also, most of them, made remarks of a brief character upon the omission of the word "executors," already referred to in the pages of this Journal for September, but one and all seemed to regard it as immaterial. The only other distinction between *Muir's* case and that of *Lumsden* v. *Buchanan* founded upon the terms of the contract in each instance was, that whereas in *Lumsden* v. *Buchanan* the transfer had been made to the "trustees for Mrs. Ellen Browne," while here the words were "*as* trust-disponees within mentioned." Lord Selborne on this matter said that the law of Scotland adopted no fixed rule as to the effect of words like these, it being always a matter depending upon the context and upon the circumstances. "If," he added, "they are open to either of two constructions—the one consistent with the context and with the substance of the contract, the other repugnant to and destructive of it—the former ought certainly to prevail. Applying that test, it certainly appears to me that in this deed of transfer the words 'as trust-disponees' not only may mean, but do mean the same thing which was meant by the designation of trustees (though without the word 'as') in *Lumsden* v. *Buchanan*." "As a general rule of construction," said another learned Peer, "ambiguous expressions in a contract should not be construed in a sense that would frustrate the main object of the contract. They should be construed *ut magis valeat*, and if the trustees meant to limit their liability, it was for them to see that the words were sufficient to make that clear."

The Court of Session through the Lord President had suggested an explanation differing from that of the appellants' entirely, but supplying, what seemed to be almost necessary, a good reason for the employment of the words "as trustees," and for the custom of Scotland as to notice of trusts, a custom, as we have seen, approved by statute. In the House of Lords this same view was taken of the real reason for the use of the words founded on in the deeds of transfer, and Lord Hatherley spoke with approbation of the practice as one which avoided considerable inconvenience, such as that frequently caused by the prevalence in England of an opposite practice. An instance was given of what might happen where a man had become surviving trustee of several, and held stock in the Bank of England also of his own, when he went to the bank for the first time after the death of his co-trustee, he might find instead of, say, £5000 of his own stock, £15,000 standing in his name, the rest being the property of the trust, and all this because the bank

would not recognise trusts, or trustees as such. His Lordship added: "That is not always the most convenient arrangement, and sometimes it leads to worse accidents than that, because if the last survivor of three or four trustees happened to be a person of dishonest character, he is the sole proprietor, and has the sole command of the stock, and the bank is entirely free from all the responsibility in dealing with it. That appears to have been thought, as the learned Judges say, not a desirable position to place matters in; and therefore, for the sake of the *cestui que* trust, notice is taken, upon the face of the bank books, of the existence of the trust, and a second advantage also accrues to him—namely, that when changes take place in the trust, then there is a note in the bank books, which tells what has occurred, without the necessity of having a new deed entered for the purpose of saying that such a change has been made, and parties are thereby liberated from some expense and from a good deal of inconvenience." So also Lord O'Hagan thought the practice of noticing trusts on the register of companies in Scotland was solely for the purpose of facilitating the proof of the character of the property and nothing more, while Lord Blackburn said that it marked that the "property in the shares is trust property, which is, it is true, for the convenience of the trust only, but it also informs the bank that the property belongs to trustees, and will consequently, in case of death, vest by survivorship, and it is for the benefit of both parties that this should be known from the beginning."

We have thus the unanimous decision of the Court of last resort finding that the liability of trustees is a personal liability in the case, at all events, of the City of Glasgow Bank and of all similar unlimited partnerships; but though the decision is to be accepted as irrevocably fixing the law of Scotland on this matter, yet there are not a few considerations to which attention may be properly directed before we pass on to the other cases decided in connection with this painful and ruinous liquidation. The whole remarks of the Lord Chancellor, especially in *Muir's* case, were pointed towards a mode of explaining away the appearance of the notice of trust on the register of shareholders; it was explained to be there as a benefit to the beneficiaries, as a means of publishing the mode in which the shares were held, that is to say, jointly and with a right of survivorship, and as a means for simplifying the means of retiring from a trusteeship; the explanations thus were all taken as against the trustees, yet the same learned Lord is found saying: "It is difficult to use words which will adequately express the sympathy I feel for all those who have been overwhelmed in the disaster of the Glasgow Bank, and that sympathy is peculiarly due to those who, without any possibility of benefit to themselves, and probably without any trust estate behind sufficient to indemnify them, have become subject to losses or ruin by entering for the advantage of others into a partnership attended with risks of which they probably were

forgetful or which they did not fully realize." Now putting aside for the moment the purely legal reasons upon which the judgment of the House of Lords was based (and we confess that if *Lumsden* v. *Buchanan* was to stand as an authority these reasons were incontrovertible), we may look at the hardship to individuals, the difficulty in ordinary commercial transactions, and the curious results even in law issuing from the decision. Not merely the Lord Chancellor, but one judge after another expressed the pain they felt at having to decide against the trustees; thus we read in Lord O'Hagan's opinion that he thought it "impossible to approach the decision of this case without feelings of the deepest pain. That persons undertaking the onerous duties of trustees from kindliness to others, and without the smallest view to their personal advantage, should be involved in ruinous responsibilities, which in many cases may not have been within their contemplation when they accepted their trusts, must be regarded as a calamity appealing to our sympathy and compelling our regret." The unfortunate trustee may be called up by the liquidators to give up his last shilling, and not only thus may there be one or two, but perhaps half-a-dozen individuals involved in ruin, while the very estate on which he acts as trustee, for whose benefit the dividends have been received and paid away, escapes scot free. The trustee, be it further observed, is not in the position, say, of a judicial factor or of one who is paid for what he does. The duty is one where the law itself will not permit compensation. The trustee has nothing to gain, and evidently a great deal to lose, besides his time and the attention given to the affairs of the estate he administers. How, then, will this affect the ordinary transactions in life? It will not be easy to get a trustee who will act, the fear of responsibility will hang heavily over all, and the result will be trust after trust will lapse, the trustees will not act, and the Court will be invoked as a *deus ex machina* to put things right. This will be done, as beneficiaries will some day learn, at a ruinous expense to them by the appointment of paid officers, whose fees and percentages will cut a deadly slice into the annual revenues of the trust estate. A local newspaper, in speaking of this matter, put its point very forcibly from the view of public opinion untrained in legal matters. "Why," it was asked, "if the trustees were to be held personally liable, was it necessary to describe them on the register as trustees? Their individual names should simply have been entered the same as the other shareholders, and not the 'trustees' as a body. It would now seem that the term trustee was simply a title of honour like Esq. or J.P., and a very costly honour it has proved. If there was doubt as to the exact reading of the law, common sense would say that in a case involving such dreadful consequences the benefit of the doubt, as in criminal cases, should have been given to the sadly betrayed trustees." It is probably not necessary for us to point out the fallacies in this

argument, which at the very outset presumes a doubt as to the legal position of trustees, and then argues upon that presumption; but apart from the fallacious character of the argument itself, lawyers will probably one and all admit that there is a moral wrong, and that something must be done to redress it. Lord Deas in this very liquidation observed with genuine feeling that during the quarter of a century for which he had sat upon the bench he had never been called upon to deliver so painful a judgment, involving as it did a deadly blow at the pecuniary interests of some five hundred innocent persons, who from no self-seeking object, but merely in benevolence and good feeling, had accepted the office of trustees, and might now be made to pay their all for a simple act of disinterested friendship.

But, over and above these considerations as to individuals, we cannot fail to notice many features in this decision which must have a more general effect, and must rule many commercial transactions in the country. The loss to be borne falls somehow on the shareholders of the failing bank, and not an unimportant aspect of their liability is presented by suggestions made by some of those who sought to find some means for relieving the victims of the burdens unhappily laid upon them. Thus, for example, it was pointed out, and with much force, that there had been fraud, and fraud of a very bad kind. No one, it was further urged, is entitled to benefit by the fraud of another, however personally innocent he might be. Suppose we admit, and we must admit, the truth of the maxim, we are at once met by the response that surely it cannot be denied that *all* shareholders who have since 1868 (or since at least the frauds have been proved to have existed) drawn dividends have really shared in the profit of the fraud, and should be called on to refund. Those who are left have to pay for the dividends not earned, but out of capital paid to those who preceded them, who reaped the profits and escaped. The answer does not appear to us difficult to give, yet it certainly limits the application of the maxim. No commerce could exist were some limit not placed upon liability of this kind, and the Legislature, in providing for contingent liability for shareholders even as long as a year after their shares have been sold, had at once defined the limit and recognised the difficulty. Why a year is selected rather than any shorter or longer period does not appear, but it is to be presumed that the time is sufficient to place the motive of sale at least beyond ordinary grounds of suspicion, and to obviate the idea of any attempt to evade unduly the liability involved in having ever held shares at all. Those who have urged this somewhat extraordinary course do not consider that when they maintain its reasonable character, they do so solely from the point of view of existing shareholders, and forget that if to their relief it would be a valuable help, it would on the other hand involve consequences the width and vastness of which no man could grasp. The share-

holders then to be sought might, many would, be dead, and their representatives surely it could not be sought to pursue with such demands. But we set aside these arguments as utterly untenable and unworkable from any legal or equitable point of view. All these complaints, it must be remembered, come from one side, and there is a fear lest amongst them the rights of creditors, many of them equally innocent with the shareholders, should be ignored. There are many banks among the largest creditors themselves, with many shareholders who would suffer. No man would know with whom he was safe to deal if any such uncertainty as to the class from whom payment was to be sought existed. But all these commercial considerations do not tell in the matter of the liability of trustees, or rather they tell the other way; for while the creditor is entitled to look to the body of shareholders for his security behind the bank itself, we fail to see how he can be said to rely on any but those shareholders of whom he has knowledge. And for the trustees themselves, this liability becomes so serious that we may not unreasonably be asked, when entering into any transaction where credit is involved, Are you a trustee? do you as such hold bank stock? and so forth.

From even the more legal position of the matter, as we have said, curious results must issue when equitable considerations intervene, and this without in any way calling in question the soundness of the judgment in *Muir's* case. It is urged that not only on the shareholders as published in the list, but upon the fact that this list contains many trusts, is the credit of the bank with the lending public founded. That is to say, that those who advance their money consider that they will have, not the trust estate, but the trustees as their debtors. Both they cannot have; the trustees, it is decided, they have got. Now it is said the trust estate might be all in the bank stock, so that there would be no further fund to go upon were it alone responsible, but we think that argument may be met in two ways. First of all, the same would be equally true of any ordinary shareholder who might have no other means save his shares in the company. Secondly, the anomaly might exist of a large trust estate with many varied funds, of which the bank shares were but a small part, held by two or three impecunious trustees. These trustees would personally be liable, but the trust estate would probably escape. The benefit, then, to creditors is not unmingled with disadvantage. These matters we have put forward rather to show how the feeling of the country, so far as can be judged, tends as regards a change in the law established by the case of *Lumsden* and confirmed by that of *Muir*. There should not be clearly any legislation merely to relieve trustees from liability that would tend to risk in all trusts, and be apt to make trustees hold recklessly in dangerous securities; but surely where a testator himself expressly gives power to hold, or directs his trustees to purchase and hold, certain securities, the fulfilment of

such an injunction should not in any way directly or mediately involve them in responsibility beyond the estate they administer. Again, where (there being no minor or other person legally incapable of acting) the beneficiaries express in formal ways a desire to retain certain investments, the trustees should be placed in a position to obtain power to hold these without personal risk. Indeed it might even be permitted to trustees in all cases where there was no opposition, or rather where there was consent by the beneficiaries, to hold all investments which came down to them from the truster with personal immunity from liability. The matter might be, in fact we think should be, different where the stock inferring the liability had been purchased by the trustees themselves.

(To be continued.)

THE HABITUAL DRUNKARDS ACT, 1879 (42 & 43 VICT. C. 19).

PERHAPS there never was an Act of Parliament originating in better intentions or drawn more carelessly than the one which heads this article. The subject, no doubt, from its novelty is one with which it is somewhat difficult to deal; but this affords no excuse whatever for gross carelessness of expression or incompleteness of provisions.

The preamble states that "it is desirable to facilitate the control and care of habitual drunkards," and to this end powers are originated for the establishment of "retreats" wherein habitual drunkards can be confined with a view to their recovery. We begin therefore naturally with the legislative interpretation of the word "retreat," which, according to section 3, is to mean "a house licensed by the licensing authority named in this Act for the reception, control, care, and curative treatment of habitual drunkards." Now, if we turn to the second schedule (which is to have effect as part of the Act) and form 2, we find the licence to be granted is alone "for the reception of persons being habitual drunkards," nothing whatever being said about their *control, care,* and *curative treatment,* so that, according to the licence, the keeper of a retreat will fulfil all that is required of him under his licence by receiving alone an habitual drunkard, it being no part of his duty to see to his control, care, or curative treatment!

Upon looking at the form of application for a licence, a reference is to be made as to the number of patients—male or female—the applicant desires permission to receive; and the licence itself is to state how many persons, being habitual drunkards, the house may contain. Now, for that licence a fee of 10s. is to be charged; but in addition to this, we find at section 14 that "every licence granted [illegible]ance of this Act shall be subject to a duty, and be im-

pressed with a stamp of £5, 10s., for every patient above ten whom it is intended to admit into the retreat; and every renewal of a licence shall be impressed with a stamp of the same amount." Now, we apprehend that no one would think of establishing a retreat for ten persons only. Such an institution, with all the attendant expenses, especially those associated with medical treatment and supervision, could hardly be supported with so small a number of patients. A licensee would therefore always arm himself with a right to receive many more that ten patients; but then, for every additional patient beyond the above-mentioned number, whether he actually has them or not, he is to be saddled with a stamp duty of £5, 10s., and this is to be annual. We apprehend that this provision will aim a deadly blow at these retreats, and it is perfectly extraordinary how such a provision could have found its way into the statute.

With reference to this branch of the subject, it is worthy of remark that, whilst it is competent to the local authority to *refuse* a licence, there is no power of appeal against such refusal, for although by section 30 any person who thinks himself aggrieved by any conviction or order of a court of summary jurisdiction, may appeal therefrom to the quarter sessions, there is no such power with reference to the refusal of a licence. This is certainly a very grave omission in the statute.

We will now consider how the statute will operate with reference to the habitual drunkard himself, and the first remark which offers itself is, that it is the habitual drunkard only who must make application to be admitted into a retreat; and in such application (of which a form is given in the second schedule, form 2) he is to state the time during which he undertakes to remain in the retreat, and such application is to be accompanied by a statutory declaration of two persons, to the effect that the applicant is an habitual drunkard within the meaning of the Act; the section (10th) further enacts that the signature of the applicant shall be attested by two justices, who shall not attest the signature unless they have satisfied themselves that the applicant is an habitual drunkard within the meaning of the Act, and shall have explained to him the effect of his application for admission into the retreat, and his reception therein; and they are to state in writing, and as a part of such attestation, that the applicant understood the effect of his application for admission, and his reception into the retreat. Now, as the Legislature was providing for habitual drunkards, it was but natural that careful provisions should be enacted that the persons proposed to be deprived of their liberty should be well-ascertained habitual drunkards alone. But how is this to be ascertained? The applicant will of course be perfectly sober when he applies, for no magistrate would be justified in listening to the application of a drunken person. The section certainly speaks of a statutory declaration of two persons to the effect that

"the applicant is an habitual drunkard within the meaning of the Act;" but there is no provision that this declaration is to be laid before the justices, or that they are to act upon it. Besides which, a mere declaration of the fact by two persons, who are not required to be householders or even credible persons, really goes for nothing without an oral examination of them to ascertain the reasons for their declaration, and this examination the justices have no power to enter into, and certainly not to have it upon oath.

Supposing, however, that the application is made and attested, does the applicant from that moment lose his right of self-control, and can he by force be compelled to enter into the retreat? and should he then change his mind, can he be carried off neck and crop to the house of his detention? We apprehend that this may be done, since his application must take effect, if at all, as soon as his application has received the assent of the authorities.

Having got him into the retreat, what is his position there? We suppose that no licensee will take an habitual drunkard into his establishment unless some promise or guarantee is given for the expense of his maintenance. But here we have the habitual drunkard an inhabitant of the retreat for a period he has agreed upon, probably a twelvemonth. Suppose, as soon as he is received, or at any time during his residence there, his payments should from any cause cease to be made; what will be the position of the licensee? Will he be bound to keep him? We believe he will be, unless the licensee can persuade a justice to discharge him; but the power of a justice to do so is governed by the 12th section, which says that "any person admitted into any retreat under this Act may at any time thereafter be discharged by the order of a justice upon the request in writing of the licensee of the retreat, if it shall appear to such justice to be reasonable and proper." This provision, however, can refer only to the personal condition of the inmate, and cannot extend to include any pecuniary arrangements, which are quite beside the jurisdiction of the justices. It will, moreover, be observed that the justice can take action under this section only at the instance of the licensee, the person confined in the retreat having no power to invoke the powers of a justice. Once in the retreat, the habitual drunkard will be liable to be detained there to the end of the term which was originally proposed as the limit of his restraint, and there he is bound to remain, unless released by the Secretary of State upon the recommendation of an inspector or assistant inspector of retreats (who may never be appointed), or in his own discretion, or by a judge of the High Court of Justice, or a County Court judge, to whom it will be usually impossible for any one confined in a retreat to get access, who themselves cannot release an applicant except upon a report of a person specially authorized to visit and examine the person so detained. We may take it, therefore, that the position of a person confined in a retreat will, if he desire his liberty, be one of very great diffi-

culty and embarrassment, and will no doubt weigh most powerfully with any habitual drunkard in determining whether or not he will surrender himself to the guardianship of the licensee of a retreat.

The person, moreover, who becomes an inmate of a retreat under the provisions of this Act will subject himself to criminal punishment for wilfully neglecting or refusing to conform to the rules of the retreat, and by section 25 he may be summarily convicted and subjected to a penalty not exceeding £5, or (at the discretion of the Court) to be imprisoned for any period not exceeding seven days, at the expiration of which he is to be brought back to the retreat. Here we have an alternative penalty of a fine or imprisonment. In the latter case the defendant is, upon the expiration of his imprisonment, to be brought back to the retreat; but suppose a fine only is imposed, with the alternative of imprisonment if not paid, and in default of distress he goes to prison, what right in that case will any one have to return him to the retreat? The provision as to bringing him back to the retreat operates only where the imprisonment was the primary punishment inflicted for the offence, and has no operation when the imprisonment is only in default of distress—hence when the defendant is discharged from imprisonment for such latter cause, there will be no power to return him to the retreat, nor can he be re-apprehended. If the defendant be convicted he has a right, under section 6, to appeal to the quarter sessions, but the conditions imposed, which are precisely similar to the ordinary cases of convictions, are so utterly inapplicable to an inmate of a retreat, that the right must necessarily be almost illusory. In ordinary cases of conviction the defendant, upon giving notice of appeal, and entering into his recognisances, if then in custody, is at once released from prison, and so is enabled with effect to prepare for the quarter sessions. But in case of the conviction of a person confined in a retreat, he is, at the expiration of the period of his imprisonment, to be relegated to the retreat, where he may prosecute his appeal as best he may! In truth, all the provisions relative to an appeal are singularly inapplicable to the case of an habitual drunkard confined in a retreat, more especially the 4th sub-section, which enacts that "where an appellant is in custody any justice having jurisdiction in such complaint may, if he thinks fit, on the appellant entering into such recognisance or giving such other security as to such justice shall seem sufficient, release him from custody." If, therefore, whilst the defendant is still in custody he enters into the prescribed recognisance, the justice may, and no doubt would, order his release, whereby he would become a free man, and under no compulsion to return to the retreat.

We have here pointed out some of the more obvious blemishes of this statute, and although we fully expect that it will prove a complete failure, we cannot but regret that so ill-framed a legislative measure should find its way into the statute-book.—*The Law Times.*

THE SALE OF FOOD AND DRUGS AMENDMENT ACT, 1879.

"A FELON is a man, and often a resolute one; but what is this thing that stabs and runs away into a hole? The shopkeeping assassin who puts red-lead, a deadly poison, into red pepper, and sells death to those by whom he lives. The shopkeeping assassin who puts copper, a deadly and cumulative poison, into pickles and preserves, and poisons those by whom he lives. The English assassin who poisons the young children wholesale in their sugar-plums, and then reads with virtuous indignation of the Sepoys who bayoneted them in their rage, instead of killing them cannily. The miller, abandoned of God, and awaiting here on earth his eternal damnation, who, king of all these Borgias, thief and murderer at once, poisons young and old at life's fountain, breaks life's very staff, mixes plaster-of-Paris with the flour that is the food of all men, the only food, alas! of more than half the world. These and a score more respectables are the hopeless cases. A cracksman or a swell-mobsman is terribly hard to cure. But these are incurable. The world's good opinion fortifies their delusion. They open their eyes for the first time in hell. A pickpocket now and then opens them in gaol."

Many years have elapsed since Charles Reade penned this fulmination, and they have proved that the adulterator was not quite as incurable as he was painted. He is black enough still, indeed, but he has half-opened his eyes. And as for the "king of all these Borgias," he seems (notwithstanding a recent isolated case) to have wellnigh altogether abandoned his evil ways, and if yet to be associated with Borgias, they should be not of the type of the "flagitious and abominable Lucretia," but of "the respectable and honoured Duchess of Ferrara," as Roscoe portrays her in his "Life of Leo the Tenth." There has been, in fact, a great and general decline of adulteration, as Dr. Hassall rightly allows to be unquestionable in the *Times* of the 3rd inst., so much so as to justify the comment of that journal that, "by the comparison of two periods, it appears that thirty years ago adulteration was the rule, and purity—that is, entire genuineness—was the exception. Genuineness is now the rule, at least as regards articles of food, and spuriousness the exception." We have no doubt, at all events, that this description would accurately represent the state of things in Ireland, although we are unable to fortify it by statistics; and, by the way, it would be well if Dr. Hancock would devote some special consideration to this matter in his future compilations of "criminal and judicial statistics." In England we find that of 16,191 articles of food examined last year, 2782 or 17·2 per cent. were adulterated. Only about 7 per cent. of the samples of bread examined were reported against, for the most part in consequence of additions of

alum to improve the appearance, while of 600 samples of flour only 11 had been similarly tampered with; of 76 samples of wine, only 2 were reported against, and about 5 per cent. of the 999 samples of beer examined, salt being mostly the addition, and the use of noxious ingredients seeming to be nearly obsolete; of 5000 samples of milk, only one-fifth failed to reach the generally adopted standard; and there was also a great diminution in the quantity of tea imported found unfit for food. On the other hand, it appears that nearly half the samples of spirits were diluted with water, and that the sale of a compound of foreign fats in place of butter is somewhat on the increase, as also of adulterated coffee; while the adulteration of drugs prevails to a larger extent still than that of articles of food and drink. But, on the whole, according to the Local Government Board, though the growing demand for excessive cheapness (to which we may add the habit of buying on credit, by which the purchaser places himself more or less at the shopkeeper's mercy) has a tendency to produce spurious imitations, adulteration seems to be diminishing, while in character, where it exists, it is much less noxious than formerly. And the public, as Dr. Hassall observes, "can now procure bread without alum; coffee without roasted wheat, beans, or even chicory; cocoa without fecula; bottled fruits, vegetables, and pickles without copper; potted meats without bole Armenian; mustard without wheat-flour and turmeric; cayenne without red-lead; vinegar without sulphuric acid; but milk still, unfortunately, often not without water." But though, as he adds, "if Accum were living at the present time, he would find much greater difficulty than formerly in discovering 'death in the pot,'" we would urge that, instead of vigilance being relaxed in consequence, there are now greater reasons for its being increased. In the first place, not only has the advance of science furnished more means of adulteration, but the adulterator has now learned the limits of discovery in the present state of science; and in the next place, the increased import of foreign food creates a greater exposure to adulteration, especially as the adulterator is not so amenable to the deterrent effects of publicity in this country. And we regret to say that in America, in particular, according to official reports, it appears that matters are very unsatisfactory, for there it appears that the shopkeeping assassin still puts red-lead into red pepper and curry powder, chromate of lead into mustard, sulphuric acid (and sometimes arsenic and corrosive sublimate) into vinegar, chicory and clay into coffee, creosote, salts of copper, and alum into spirits, and sells death to those by whom he lives; while the "king of all these Borgias" has several mills at work grinding stone into powder for admixture with flour, which is also occasionally mixed with bone-dust, sand, and clay. But it is to be hoped that, as regards milk adulteration, matters are not now so bad as when, in 1874, the Commission appointed by the Boston Board of Health reported that a million

and a half gallons of impure and poisonous water had been sold as milk during the year. The standard of genuineness adopted in this country is rather low, as the present state of science does not enable the analyst to pronounce beyond a certain limit whether excess of water is due to natural poverty of milk of ill-fed cows, or to the dilution of milk which was originally good. But even this standard Mr. Watson, F.C.S., in a paper read at the recent meeting of the British Association, maintains should be reconsidered, as from analysis of various samples of milk, and by a comparison of the results obtained with the circumstances existing as to the character of the food, the nature of different cows, and their conditions and health at particular periods and changes of the seasons, he had found that milk is subject to considerable variation in composition (a variation, we may add, which may also be produced by the number of milkings, as demonstrated by the recent experiments of M. Lami of Geneva); and in many instances he had found milk from well-fed healthy cows to contain as little as 10·5 per cent. of total solids, and from 8·5 to 9 per cent. of solids not fat. And, certainly, if this be correct (though disputed by Professor Wanklyn and others), one cannot avoid an impression that possibly there may have been some wrongful convictions; although many analysts may have been cautious enough, like Professor Wanklyn, while taking the mesne standard, 9·3 of solids not fat, to refrain, in stating the result, from what is practically advising a prosecution unless 10 per cent. of water was found. Nor is it impossible that, as one of the speakers maintained, legislation may actually produce adulteration, because the milkman, who before did not know the limits of science, is now aware to what extent he may safely adulterate. While the scientists are "at sea," a canny milkman in such cases has more command than Canute over the watery element, and knows how far to bid it go and no farther. Indeed, chemical analysis not only seems to be rather uncertain at present, but occasionally renders rather odd results, as in an instance which came before the Guardians of Baltinglass Union, on the 2nd inst., when it appeared that, of some samples of milk submitted to Dr. Cameron, the one which he reported as the richest yielded the lowest degree of cream, whereas the one he termed rather poor gave a very good average of cream.

It will be no longer possible, however, for the milkman to evade the law, at all events, by vending his commodity in the middle of the street, which was recently held not to come within section 17 of the Act of 1875; for by the Sale of Food and Drugs Amendment Act, 1879 (42 and 43 Vict. c. 30), section 17, it is now enacted that "any street or open place of public resort shall be held to come within the meaning of section 17 of principal Act." Again, the conflict of authorities on the construction of section 6 of the old Act, to which we recently adverted, as to a sale to a person who required the article solely for the purpose of

having it analysed, has been finally set at rest; for, by section 2 of the new Act, it is provided that, in any prosecution under the provisions of the principal Act for selling to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, it shall be no defence to any such prosecution to allege that the purchaser having bought only for analysis was not prejudiced by such sale, etc. Moreover, an unsatisfactory state of the law, in which it was left by the decision in *Webb* v. *Knight* (2 Q. B. D. 530; 46 L. J. M. C. 264; 36 L. T. N. S. 791), has been remedied by the 6th section of the new Act, which enacts that "in determining whether an offence has been committed under section 6 of the said Act by selling to the prejudice of the purchaser spirits not adulterated otherwise than by the admixture of water, it shall be a good defence to prove that such admixture has not reduced the spirit more than twenty-five degrees under proof for brandy, whisky, or rum; or thirty-five degrees under proof for gin." Of course, the dealer may still sell spirits lowered to a greater degree than that here specified; but should he do so, it will be necessary to inform his customers that the spirits are mixed, as was done in *Sandys* v. *Small* (3 Q. B. D. 449; 47 L. J. M. C. 115; 39 L. T. N. S. 118; 42 J. P. 550). An officer, inspector, or constable may obtain a sample of milk at the place of delivery, to submit the same to an analyst. "The seller or consignor, or any person or persons intrusted by him for the time being with the charge of such milk, if he shall refuse to allow such officer, inspector, or constable to take the quantity which such officer, inspector, or constable shall require for the purpose of analysis, shall be liable to a penalty not exceeding £10." Quarter sessions boroughs are to be exempt from contributing to the expenses of the county analyst; and provision is also made for boroughs with separate police. The last section in the new Act contains a special provision as to prosecutions under the principal Act, and, notwithstanding section 20 of the principal Act, it is now enacted that the summons to appear before the magistrate is to be served upon the person charged within a reasonable time, and, in case of a perishable article, not exceeding twenty-eight days from the purchase. The particulars of the offence and the name of the prosecutors are to be stated in the summons, and the same is not to be made returnable in less than seven days from the service on the person summoned.

This is undoubtedly a useful and highly practical statute, which is calculated to interfere considerably with the shopkeeping assassin, who might be described to-day as he was 250 years ago by Bishop Earle, as one whose "conscience was a thing that would have laid upon his hand, and he was forced to put it off, and makes great use of honesty to profess upon. He never speaks so truly as when he says he would use you as his brother; for he would abuse his brother, and in his shop thinks it lawful." But it is

also no less true to-day than when Horace wrote, "*quid leges, sine moribus vanæ proficiunt;*" nor should we allow ourselves to be lulled into the belief that the adulterator will be wholly reformed by any Act of Parliament however drastic. And though his case may not be quite so hopeless as the author of the "Autobiography of a Thief" would insist, we fear it is bad enough to justify the author of "The New Magdalen" in making the Rev. Julian Grey observe, "My grocer, loud in my praises in his Sunday coat, turns up his week-day sleeves and adulterates his favourite preacher's sugar as cheerfully as usual."—*The Irish Law Times.*

Correspondence.

ACCURACY ABOUT ADJUDICATIONS.

(*To the Editor of the Journal of Jurisprudence.*)

SIR,—In the first volume of Mr. Mackay's treatise on the Practice of the Court of Session, at p. 207, there occurs the following passage: "There is no authority for the first part of the statement in Dove Wilson (Sheriff Court Practice, 2nd edition, p. 365) that '*all adjudications in use were at one time competent to the Sheriff Court, but since* 1672 *they have been competent only in the case of the death of the proprietor whose heir renounces the succession.*' Adjudications were for the first time introduced by 1672, cap. 19, which expressly gave the jurisdiction to the Court of Session."

When this passage appeared I drew Mr. Mackay's attention to it, pointing out, firstly, that the ground on which he challenged my statement was mistaken, and secondly, that for my statement itself there existed sufficient authorities. I thought my explanation would have convinced Mr. Mackay, but the second volume of his work has appeared, and though I find in it some things concerning adjudications which seem to me scarcely consistent with what he said in his first volume, I do not find that he has modified his opinion as to the statement which he quoted from me. I therefore trouble you with this letter.

The ground on which Mr. Mackay challenges my statement is given when he says that "adjudications were for the first time introduced by 1672, cap. 19." This is a mistake. Reported decisions of any kind bearing date prior to 1672 are few, but the Dictionary of Decisions contains four showing that adjudications *contra hereditatem jacentem*, and two showing that adjudications in implement were in use before 1672 (M. 43, 44, 51, 52). The only kind of adjudication which there is any ground for saying was introduced for the first time in 1672 was the adjudication for debt, and even as to this there is much room for doubt. It is clear that

in 1672 it was made imperative to use an adjudication for debt where an apprising would formerly have been used, but as the relation between adjudication and apprising was, as Sir Thomas Hope explains, simply that between ordinary action and summary diligence, it seems to me rash to conclude that adjudications for debt were then invented. The adjudication in security is the only kind of which it may be safely said that it was introduced after 1672.

The next question is whether the adjudications in use prior to 1672 were competent to the Sheriff Court? The adjudications which beyond doubt were in use before that date were, as I have just pointed out, the adjudication *contra hereditatem jacentem*, and the adjudication in implement. My authority for saying that the former were competent to the Sheriff Court will be found in three decisions to that effect by the Court of Session, duly reported in the Dictionary (M. 46-49), and my authority for saying that the latter were competent is the opinion of Erskine to that effect, duly given, with the reasons for it, in his Institutes (2, 12, 53). If other adjudications were in use prior to 1672, I conclude that they were also competent in the Sheriff Court. If the action was competent at all in the Sheriff Court, it is exceedingly improbable that it was competent only in the complicated cases which I have mentioned, and not competent also in the other, which are comparatively simple cases. It will be noted also that when apprisings were abolished, it was considered necessary to use express language to confine to the Court of Session the jurisdiction in the adjudications which it was made imperative to use in their place.

I think I have sufficiently justified my accuracy. The authorities were not quoted by me originally, because they were unnecessary for my purpose, which simply was to advise practitioners in the present state of the law not to bring adjudications in the Sheriff Court; and it occurred to me that they were already sufficiently accessible to any one desirous of studying the history of the matter. As my incidental remark has caught Mr. Mackay's critical attention, I think it right to show that it was deserving of it. The point at issue is not of great importance, but it well illustrates the unwillingness of all writers in the Court of Session either to admit that heritable jurisdiction ever belonged to any extent to the Sheriff Court, or to relate fully the way in which it was lost.—I am, etc., J. DOVE WILSON.

SHERIFF CHAMBERS,
ABERDEEN, *30th August* 1879.

Obituary.

LORD GORDON OF DRUMEARN.—The hand of death has been busy among the occupants of the Judicial Bench lately. Last month

we chronicled the death of Lord Jerviswoode, while this month's obituary contains the name of Lord Gordon, who died recently at Brussels at the comparatively early age of sixty-five.

We think it may safely be said that few men during the whole course of their professional career were more universally esteemed and better liked than was Edward Strathearn Gordon. Born in 1814, of a good Highland family, he was called to the Bar in 1835. He succeeded in getting a fair share of practice there, and was in time appointed an Advocate-Depute, and eventually Sheriff of Perthshire. He was Solicitor-General in 1866, and succeeded George Patton as Lord Advocate in 1867, again resuming that office on the return of his party to power in 1874. Between these dates he held the office of Dean of Faculty, to which he was elected by the unanimous voice of his brethren at the Bar. In 1876 he was created a Lord of Appeal in Ordinary with a Life Peerage, and he continued to exercise the functions of that office with as much assiduity as his health would permit till within a short time of his death.

Such is the outline of the career of a man who, possessing no adventitious aids to fortune, won his way by sheer force of character and painstaking industry to the highest honours of his profession. And the prizes were attained by no mean devices or tricky shifts. The name of Edward Gordon was synonymous with all that was honourable and of good report; all men recognised in him the elements of purity, gentleness, and candour developed in a very high degree. In the heat of forensic debate he never overstepped the line which divides the fair opponent from the partisan lawyer, while in private life he was everything that was courteous and amiable. Many members of the junior Bar will remember the kindly interest he took in them on their entrance to the Faculty, and the generously tendered offers of advice and guidance, advice which was sure to be sound and guidance which might safely be relied on. A careful and accurate, if not a brilliant lawyer, it is to be regretted that his health did not permit his giving full scope to his powers in the House of Lords. Still, the judgments he delivered there were invariably sound and carefully considered.

In private life, as we have said, Lord Gordon was a universal favourite. Gentle in his manner, he secured the esteem of all with whom he was brought in contact. For several years he was captain of the Advocates' Volunteer Company, and he afterwards was appointed colonel of one of the volunteer regiments in Edinburgh. Few men have left behind them a memory of so blameless a life.

The death is announced of Mr. ISAAC GRANT THOMPSON, of the New York bar. Mr. Thompson was the founder and managing editor of the *Albany Law Journal*, which he conducted for the last ten years with marked ability and success. He was also the author of several legal works, and the editor of the American Reports.

The Month.

An Act to amend the Sale of Food and Drugs Act, 1875.—21*st July* 1879.

38 *&* 39 *Vict. c.* 63.] Whereas conflicting decisions have been given in England and in Scotland in regard to the meaning and effect of section six of the Sale of Food and Drugs Act, 1875, in this Act referred to as the principal Act, and it is expedient, in this respect and otherwise, to amend the said Act:

Be it enacted, etc.:

1. *Short title.*] This act may be cited for all purposes as the Sale of Food and Drugs Act Amendment Act, 1879.

2. *In sale of adulterated articles no defence to allege purchase for analysis.*] In any prosecution under the provisions of the principal Act for selling to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, it shall be no defence to any such prosecution to allege that the purchaser, having bought only for analysis, was not prejudiced by such sale. Neither shall it be a good defence to prove that the article of food or drug in question, though defective in nature or in substance or in quality, was not defective in all three respects.

3. *Officer, inspector, or constable may obtain a sample of milk at the place of delivery to submit to analyst.*] Any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, or any police constable under the direction and at the cost of the local authority appointing such officer, inspector or constable, or charged with the execution of this Act, may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk; and such officer, inspector, or constable, if he suspect the same to have been sold contrary to any of the provisions of the principal Act, shall submit the same to be analyzed, and the same shall be analyzed, and proceedings shall be taken, and penalties on conviction be enforced in like manner in all respects as if such officer, inspector, or constable had purchased the same from the seller or consignor under section thirteen of the principal Act.

4. *Penalty for refusal to give milk for analysis.*] The seller or consignor, or any person or persons intrusted by him for the time being with the charge of such milk, if he shall refuse to allow such officer, inspector, or constable to take the quantity which such officer, inspector, or constable shall require for the purpose of analysis, shall be liable to a penalty not exceeding ten pounds.

5. *Extension of Act as to sale in streets, etc.*] Any street or open place of public resort shall be held to come within the meaning of section seventeen of the principal Act.

6. *Reduction allowed to the extent of* 25 *degrees under proof for brandy, whisky, or rum, and* 35 *degrees for gin.*] In determining whether an offence has been committed under section six of the said Act by

selling, to the prejudice of the purchaser, spirits not adulterated otherwise than by the admixture of water, it shall be a good defence to prove that such admixture has not reduced the spirit more than twenty-five degrees under proof for brandy, whisky, or rum, and thirty-five degrees under proof for gin.

7. *Extension of meaning of "county."*] Every liberty having a separate court of quarter sessions, except a liberty of a cinque port, shall be deemed to be a county within the meaning of the said Act.

8. *Quarter sessions boroughs not to contribute to county analyst. 5 & 6 Will. IV.* 76.] The town council of any borough having a separate court of quarter sessions shall be exempt from contributing towards the expenses incurred in the execution of the principal Act in respect of the county within which such borough is situate, and the treasurer of the county shall exclude the expenses so incurred from the account required by section one hundred and seventeen of the Municipal Corporation Act, 1835, to be sent by him to such town council.

9. *Provision for boroughs with separate police.*] The town council of any borough having under any general or local Act of Parliament, or otherwise, a separate police establishment, and being liable to be assessed to the county rate of the county within which the borough is situate, shall be paid by the justices of such county the proportionate amount contributed towards the expenses incurred by the county in the execution of the principal Act by the several parishes and parts of parishes within such borough in respect of the rateable value of the property assessable therein, as ascertained by the valuation lists for the time being in force.

10. *Special provision as to time for proceedings.*] In all prosecutions under the principal Act, and notwithstanding the provisions of section twenty of the said Act, the summons to appear before the magistrates shall be served upon the person charged with violating the provisions of the said Act, within a reasonable time, and in the case of a perishable article not exceeding twenty-eight days from the time of the purchase from such person for test purposes of the food or drug, for the sale of which in contravention to the terms of the principal Act the seller is rendered liable to prosecution, and particulars of the offence or offences against the said Act of which the seller is accused, and also the name of the prosecutor, shall be stated on the summons, and the summons shall not be made returnable in a less time than seven days from the day it is served upon the person summoned.

Obstructing an officer in the execution of his duty.—The following is the report of a case tried at Inverness Circuit Court on the 4th of last month. Some remarks on it will be found on another page:—

John Sutherland, farmer and fisherman, residing at Brownaban of Thrumster, Caithness, was charged with deforcing an officer of the law in the execution of his duty. The indictment set forth that William Corbet Miller, sheriff-officer, along with Thomas Bain, another sheriff-officer, was apprehending the said John Sutherland under a warrant on 14th May last, when Sutherland refused to accompany them, and having withdrawn himself a pace from them, flourished a swingle-tree of a plough and threatened to put it through the skull of either of them who

should attempt to apprehend him, notwithstanding the fact that the warrant was read to him.

Prisoner pled guilty as libelled, and Mr. Mackenzie on his behalf pointed out that the case was not a serious one, and that nobody was injured, while the prisoner, who was a small farmer, was a man totally unacquainted with the processes of law. The prisoner was apprehended criminally the next day, and a part of the debt for which the officers desired to apprehend him had been paid. Counsel submitted that a fine would meet the ends of justice.

Lord Young—How can he pay a fine when he can't pay his debts?

Mr. Mackenzie—The panel is a small farmer, my Lord.

Lord Young asked if the pursuer was now willing to surrender himself for the debt.

Mr. Mackenzie said he believed he was.

Lord Young—Does the creditor wish to enforce the warrant? If so, why has it not been enforced before this?

Mr. Nimmo, the creditor's agent, said the papers had been taken from him in May last, and had been in the hands of the fiscal ever since. He therefore could not enforce the warrant, but certainly intended to do so when he got the papers back, unless the balance of the debt was paid.

Lord Young said the case had surprised him. Imprisonment for debt was quite lawful in Scotland, although it had been abolished elsewhere except under peculiar circumstances. The prisoner seemed to have resisted the sheriff-officer and his assistant, who held a warrant for his apprehension for a debt of £11, and they consequently felt alarmed or affronted—his Lordship could not say which. His Lordship could not understand how the Sheriff had not at once proceeded to vindicate the law by enforcing the warrant; but he seemed to have thought it right to examine the prisoner on this charge and send him here. He (Lord Young) thought it would have been a much more reasonable proceeding to have enforced his warrant, and then administered any suitable chastisement to the prisoner for his irregular and violent proceeding. This he could very well have done. Addressing the prisoner, his Lordship said for him to resist the law was simply ridiculous, but how the warrant had not been at once enforced instead of being now delayed some four or five months was simply incomprehensible. The Sheriff, however, had neglected his duty, and had left that to be discharged by this Court. The Sheriff should now take care that, if the creditor desired it, the warrant was at once enforced. The penalty would be a fine of 40s. or one month's imprisonment.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF LANARKSHIRE.

Sheriffs Clark and Lees.

THE COMMISSIONERS OF THE BURGH OF PARTICK, ETC., *v.* M'FADZEAN, *3rd July* 1879.

Slaughterhouse—Police Acts of 1850 *and* 1862*—Cost of maintenance—Title to sue—Liability to pay rates.*—The pursuers having erected a slaughterhouse

under the powers contained in the Police Act of 1850, which throws the cost of it on the burgh, and having thereafter adopted the Police Act of 1862, which provides for rates and penalties being exigible, two questions arose—(1) whether the pursuers could in the circumstances charge such rates? and (2) what amount of proof was requisite to establish that rates and penalties were exigible? The case was brought in the Small Debt Court, but transferred to the ordinary roll; and after written pleadings and proof the Sheriff-Substitute gave judgment as follows:—

"*Glasgow*, 1*st April* 1879.—The Sheriff-Substitute having considered the cause, Finds in fact—(1) that in 1852 Partick was constituted as a police burgh by its adoption of the Police Act of 1850; (2) that in 1858 the fleshers of the burgh petitioned the Commissioners of the burgh to avail themselves of the powers conferred by the Police Act of 1850 to provide a slaughterhouse, the expense of which fell to be borne in terms of the Act by the ratepayers of the burgh; (3) that eventually in 1864 it was resolved by the Commissioners to provide the slaughterhouse asked, and that it was accordingly erected at a cost of £1200; (4) that in 1864 the Commissioners made certain byelaws in regard to the slaughterhouse, by one of which a scale of payments by those using it was provided; (5) that in 1866 the Commissioners of the burgh adopted the provisions of the Police Act of 1862; (6) that by the 18th section of that Act it is provided that where the Act is adopted in whole by any burgh, 'any general or local Police Act in operation within such burgh shall be repealed except in so far as it may relate to matters not provided for in this Act;' (7) that the Police Act of 1850 does not provide for any matter in regard to slaughterhouses which is not provided for by the Police Act of 1862; (8) that by the 363rd section of the latter Act it is declared that if the Commissioners resolve to provide and establish, and do provide and establish, a slaughterhouse in virtue of the powers contained in that Act or in any local Act, no other places are to be used for the purposes of slaughtering cattle under a penalty of £5, and if any person brings within the burgh for purposes of sale or consumption the carcasses of any cattle slaughtered two miles beyond the boundaries of the burgh, he shall pay the same dues as if they had been slaughtered in the burgh slaughterhouse; (9) that by the same section it is provided that the dues for the use of the slaughterhouse are to be 'such reasonable rate or sum as may be agreed on and fixed between them' (the Commissioners) 'and the persons using the same,' and that in the case of difference the Sheriff is to fix the rate; (10) that since the byelaws were made by the Commissioners of Police as aforesaid in 1864, the fleshers using the slaughterhouse have been in use to pay the dues specified in these byelaws, and that no question has been shown ever to have been raised as to the amount of the charge made; (11) that the defender on 6th February 1879 brought within the burgh for the purposes of sale or consumption the carcasses of four cattle killed more than two miles beyond the boundaries of the burgh; (12) that the dues payable thereon amount to three shillings, and that the defender has not paid the Commissioners this sum, and refuses to do so on the ground that they are not entitled to demand any payment from him; (13) that the Commissioners have for purposes of convenience and economy farmed out the charge of the slaughterhouse and of levying and receiving the dues payable by the fleshers to the co-pursuer, Forrest: Finds in law (1) that such lease, though it gives Forrest a right to ask and take payment of these dues, does not entitle him to enforce payment thereof in a court of law, but that such payment can be enforced only by the Commissioners, as provided for by the statute, and that accordingly he has no title to sue; therefore dismisses the action *quoad* him, but finds no expenses due to or by him: Finds in law (2) that on the adoption in 1866 by the Commissioners of Partick of the Police Act of 1862, the Police Act of 1850, which they had formerly adopted, was thereby repealed in regard to the burgh so far as the slaughterhouse of the burgh was concerned, except as regards the rights of creditors under any obligations incurred by them in connection with the providing of said slaughterhouse; and that after 1866 the rights of the Commissioners to regulate

and manage the slaughterhouse, and of persons to use it or slaughter cattle in the burgh or bring the carcasses of cattle within it, fell to be regulated by the terms and the provisions of the Police Act of 1862: Finds in law (3) that the payment by fleshers between 1866 and 1879 of the dues levied by the Commissioners without question as to the reasonableness of the rate demanded being made at any time, or in this case, is sufficient proof for the purposes of the case that the rate was reasonable and has been accepted as the agreed-on rate in terms of the statute; therefore repels the defences against payment of the sum sued for, and decerns against the defender for payment to the pursuer, Robert M'Gowan, as clerk to the Commissioners of the burgh of Partick, and as such the person entitled to sue as their representative, of the sum of three shillings: Finds the pursuer, the said Robert M'Gowan, entitled to expenses, etc. J. M. Lees.

"*Note.*—The sum in dispute in this action is small, but the point on which the decision of the case must rest is of some importance to the ratepayers of the burgh of Partick. I therefore transmitted the case from the Small Debt Roll to that of the Ordinary Court.

"The ultimate question raised by the parties is, Is any part of the cost of the slaughterhouse to be borne by the fleshers, or is it all to be borne by the ratepayers of the burgh of Partick? In 1852 Partick was constituted as a burgh under the Police Act of 1850. By the 319th section of that Act the Commissioners of any burgh which has adopted the Act are authorized to 'purchase, rent, build, or otherwise provide such slaughterhouse as they think proper for slaughtering cattle within the burgh.' In 1858 the fleshers of Partick presented a memorial to the Commissioners, asking them to provide a public slaughterhouse; but it was not till 1864 that a resolution of the Commissioners to do so was carried and confirmed. A slaughterhouse was accordingly erected at a cost of £1200. By clause 340 the Commissioners are authorized to assess 'all occupiers within the burgh' to a certain extent, so as eventually to repay the money borrowed for the cost of erecting the slaughterhouse. In 1864 the Commissioners made certain byelaws, under one of which certain charges are imposed for each head of cattle killed in the slaughterhouse, and these byelaws were shortly afterwards sanctioned by the Sheriff. The rate or charge has been in use to be paid, with little question or exception, ever since.

"In 1866 the Commissioners resolved to adopt for the burgh the Police Act of 1862. By section 358 of that Act it is provided 'that the Commissioners may provide and establish fit shambles or slaughterhouses, and for that purpose may borrow such sums of money as they shall find necessary on certain securities. And by section 363 it is enacted that if slaughterhouses are provided, no one shall kill or dress cattle within the burgh, or two miles of its boundaries, except in the slaughterhouse, under a penalty of £5; and 'to prevent evasion of the use of such slaughterhouses,' that if any one bring into the burgh for sale or consumption the carcass or part of the carcass of any cattle slaughtered two miles beyond the boundaries of the burgh, he shall be liable in payment of the slaughterhouse dues. The Commissioners are by this clause also authorized to charge as dues for the use of the slaughterhouse 'such reasonable rate or sum as may be agreed on and fixed between them and the parties using the same,' and in case of difference the Sheriff is to settle summarily what is to be the rate to be charged.

"The defender recently brought the carcasses of four cattle into the burgh from Moore Street Dead-Meat Market, and the pursuers now sue for the dues of ninepence on each of such cattle.

"To this claim the defender makes several objections. He pleads, first, that Mr. Forrest, who is a party to this action, has no title to sue. Mr. Forrest is lessee for the year of the slaughterhouse. I see nothing to prevent the Commissioners granting such a lease, although they are not expressly authorized to do so. They say they found it the most economical way of managing the slaughterhouse, and it is therefore the most beneficial one for the ratepayers, who have to pay any surplus of cost over the sum yielded by the dues. But

that has nothing to do with the present case. It will not, however, give Mr. Forrest a right to sue. The 74th section provides how the Commissioners are to sue to receive their dues, and I think the defender's objection to Mr. Forrest being made a pursuer in this action is well founded.

"His next plea is that it is not proved that the cattle were killed more than two miles beyond the burgh. Well, if they were not he will be liable in a penalty of £5. Now this is not a criminal case, in which the prosecutor must prove everything. It is a civil action, and the pursuer is only bound to produce such proof as would be sufficient in any ordinary civil case; and I think there is sufficient here in the circumstances I have mentioned for the purposes of this case. He proves that the carcasses were brought from the dead meat market in Glasgow, which is more than two miles off; and there scarcely exists room for doubt they were killed there. But admittedly they were not killed in the Partick slaughterhouse. They must, therefore, either have been killed within a distance of two miles of Partick or beyond it: if the latter, then the larger penalty is due; if the former, the smaller. The point is, they were exposed for sale in Partick, and were not killed in the Partick slaughterhouse.

"In the next place, the defender argues that the byelaws are illegal. It is quite true that the Act of 1850 does not expressly give any power to enact byelaws imposing a charge on persons using the slaughterhouse, but I feel it unnecessary to enter upon a consideration of a point of some difficulty, as it is not raised by the present case. The pursuers do not sue for the dues as under the byelaws, what they urge is that the payment by fleshers without question as to the amount of the charge for fourteen years, is simple proof that the sum charged was reasonable, and that all parties were agreed it was so. I think this argument is sound. Neither the defender nor any other Partick flesher has ever challenged the amount asked for the use of the slaughterhouse. He and one or two others have maintained that no dues are exigible. But neither in the proof nor in the debate was it suggested that the charge was anything but what was reasonable, if any charge could be reasonably made at all. I think there is, therefore, sufficient to hold the rate as reasonable and agreed to.

"In the last place, the defender contends that under the Act of 1850 the cost of the slaughterhouse was to be borne by the ratepayers; that the slaughterhouse was provided under that Act; that it was not provided under the Act of 1862; and that the latter Act was not meant to take away, and does not take away, the rights given by the Act of 1850. By the 18th section of the Act of 1862 it is provided that if the whole of the Act be adopted by any burgh, 'any general or local Police Act in operation within such burgh shall be repealed excepting in so far as it may relate to matters not provided for in this Act.' And by section 21 it is declared that 'all bonds, contracts, covenants, agreements, and securities made and entered into, and obligations incurred, and all assessments imposed or to be imposed under the Act of 1850,' in so far as regards anything done under it 'previous to the adoption of this action, shall remain in full force and effect, and shall continue available and binding on all concerned; and nothing herein contained shall be considered to affect the duties, rights, or claims of any creditor, or any special interest provided for' under the Act of 1850.

"Now the first observation I would make is, that there is nothing as to slaughterhouses in the Act of 1850 that is not provided for by the Act of 1862. On this point, therefore, the former Act stands repealed. But the question is, Do the provisions of the 21st section debar the Commissioners from imposing under its provisions dues on the fleshers using the slaughterhouse? I think it is clear that the first part of the clause which I have quoted has no such effect. It plainly refers to the case of creditors under obligations incurred by the Commissioners of the burgh under the earlier Act. The only words which could give the meaning contended for by the defender are the words, 'nothing herein contained shall be construed to affect any *special interest* provided for' under the Act of 1850. I confess I entertain little doubt that the

interest referred to here is not the fleshers' interest. I am aware it is the case that in later Acts of Parliament interest is sometimes used in the sense contended for by the defender. But I think it is on the whole plain that what the clause was meant to deal with was the rights of parties to obligations granted by the Commissioners, and that the interest referred to was the pecuniary interest on these obligations, as, for example, under clause 342.

"Giving every weight to the arguments for the defender, I think that on a just and sound construction of the terms of the various sections of the two statutes, the effect of the later Act was, where it was adopted as a whole, just to supersede the earlier Act entirely, except so far as it contained any matter not dealt with by the Act of 1850, and so far as regards the rights of creditors; and I just read the clauses of the later Act as to slaughterhouses as repealing those of the earlier Act, and giving the Commissioners power in express terms to levy dues. Nor does it seem to me any matter that, as matter of fact, the slaughterhouse was erected under the provisions of the earlier Act. It would be a somewhat judicial construction of the Act to say that before the Commissioners could avail themselves of the powers of the later Act, they must get rid of the slaughterhouse provided under the earlier one.

"No doubt some difficulty is caused by the fact that the words of the 1862 Act clearly refer to the providing of the slaughterhouse as a future act. But then if the powers conferred by the 1850 Act on the Commissioners have been taken away by its repeal on their adoption of the 1862 Act, and if the provisions of the 1862 Act do not apply to the Partick slaughterhouse, what rights or control have the Commissioners in regard to these buildings? They must have some, and their rights must be statutory; but this would leave them none. Again it will be noticed that on the adoption of the Police Act of 1862 in whole, any general or local Police Act stands repealed. But the 363rd section declares that if the Commissioners provide slaughterhouses 'in virtue of any powers contained in any local Act,' dues and penalties are to be leviable. But if the local Act is repealed how can anything be done thereafter in virtue of its powers? This would, therefore, lead one to infer that the statute means the words 'provide and establish' to be applicable also to the case of a slaughterhouse already built, but which has to be kept up and maintained. And I am under the impression that in regard to manses this is the meaning that has been put on the word 'provide.'

"Of course if local does not mean local Police Act, but simply any local Act, this difficulty does not occur. But another does. If there be a local Slaughterhouse Act applicable to any burgh, such an Act would not be repealed on the adoption of the Police Act of 1862. How then would stand matters? The local Act might quite well contain, and for all the Legislature knew possibly did contain, a provision that the cost of the slaughterhouse was, as under the Act of 1850, to be borne by the community. But the Police Act of 1862 would deprive the fleshers of their immunity from payment for the use of the slaughterhouse, and the anomaly and injustice would be legislatively sanctioned that the ratepayers in a burgh whose slaughterhouse had been provided under the Act of 1850, would be in an inexplicably worse position than the ratepayers of a burgh whose slaughterhouse had been erected under a local Act. It may be taken for granted that Parliament never intended any such anomalous or unjust result. And I do not think it has attained it. The Legislature had the power to alter, if thought fit, the incidence of the cost of providing the slaughterhouse. And, as already stated, it in my opinion has done so. The powers and provisions of the one Act just fell to be substituted for those given by the other.

"In the last place, I would observe that slaughterhouses, like all other things, will, if not kept up, get out of repair. Now if the Act of 1850 is repealed in regard to the slaughterhouse of Partick, save in so far as rights created before 1866 are concerned, and if the Act of 1862 be inapplicable to these buildings, and no dues are to be leviable, where is the fund to be found for keeping the buildings in repair? Neither Act contains any remedy unless the words 'pro-

vide and establish' have, as I think they have, this signification. But the Commissioners have no longer any power to assess under the Police Act of 1850, and thus, on the defender's contention, I do not see where the funds to keep the slaughterhouses in repair are to come from. It cannot with justice be said that the provisions of the 22nd section give any such power. The powers of assessment under the 1850 Act preserved under the 1862 Act only apply to subsisting obligations incurred under the former Act.

"I am therefore of opinion that the pursuers are entitled to enforce payment of the charge they make under the 363rd section of the Police Act of 1862.

J. M. L."

The defender appealed to the Sheriff, who pronounced the following interlocutor:—

"*Glasgow, 3rd July* 1879.—Having heard parties' procurators upon the appeal, and considered the evidence and whole process, for the reasons assigned in the subjoined note, Recalls the judgment appealed against: Finds that the pursuers have failed to prove that the four carcasses of cattle brought within the burgh of Partick by the defender were killed beyond two miles of the burgh boundaries: Therefore assoilzies the defender, etc. F. W. CLARK.

"*Note.*—This case was argued on appeal with very great ability on both sides. I quite concur with the Sheriff-Substitute in regarding it as a case of very considerable importance, and one, therefore, proper to have been transferred to the Ordinary Roll. A good many pleas were taken by the defender as to title to sue, etc., and these have all been repelled by the Sheriff-Substitute. I quite agree with him in repelling these pleas in so far as their legal effect is concerned. The only matter on which, after mature consideration, I have come to differ from him in is as to the import of the evidence. I am unable to hold that the pursuers have succeeded in proving that the animals whose carcasses were brought by the defender from Glasgow to Partick were killed outwith the boundary; and as proof of this seems absolutely necessary to support the pursuers' case, it follows, if I am right in the view I take of the evidence, that the defender is entitled to absolvitor. Yet while I thus find myself compelled to arrive at this result, the litigation, in so far as the pursuers are concerned, will not be without its value. From the clear manner in which the Sheriff-Substitute has dealt with the question of title to sue, of right to claim slaughter-house fees from those who are proved to have contravened the statutory provisions—in short, with every plea for the defender except that involving the question of fact—if any future litigation shall arise in similar cases, the question before the Court will be entirely limited to one of fact.

"As on a careful consideration of the evidence I have arrived at a different conclusion from the Sheriff-Substitute, I think it incumbent on me to state my reasons at length.

"The provisions of section 363 of 'The General Police and Improvement (Scotland) Act, 1862,' are not indeed criminal, yet they seem to be of such a nature that in their application to any given case, the evidence required must be of the same stringent kind as would be necessary in an action of a strictly penal character. They are very peculiar. They are in restraint of trade. They are of very wide application. They are not limited, as was attempted to be made out by the pursuers, to the case of butchers, fleshers, and wholesale meat-dealers who bring meat into Partick for the purpose of sale. They bring within their sweep every person who brings into Partick a carcass or any part thereof for the purpose of consumption as well as of sale. Hence they include provision merchants, keepers of co-operative stores, eating-house keepers, restaurateurs, lodging-house keepers, nay, even private individuals bringing in joints of meat from beyond the two-mile boundary for consumption on their own premises or in their private houses. All such persons are liable to pay the fees of the Partick slaughterhouse, if only the Commissioners can prove that the animal from which the joint was taken had been killed somewhere beyond the boundary. It cannot be maintained that the provisions in question

are intended to apply only to fleshers or wholesale dealers. The section contains no such limitation. Neither can it be argued that the Commissioners did not intend to apply the section to others than fleshers or wholesale dealers. The Court has nothing to do with the discretion of the Commissioners. It must take the provision as it finds it in the statute, and in giving effect to that provision, must regard not merely the circumstances of the particular case, but the possible application of that provision to cases of a different kind, but still falling within the statute. Now the provision in question is undoubtedly one in restraint of trade, and one calculated to bear heavily not merely on traders, but even on private individuals. It is therefore one in which, while the tribunals are bound to give effect to its penalties where a contravention is clearly proved to have taken place, they are not to aid the prosecutor by presumptions, or accepting anything short of the clearest evidence, that the statutory provision has been contravened. Now, what the Act requires to bring a party within its sweep is that the animal, the whole or part of whose carcass has been brought into any burgh where a slaughterhouse has been erected under the Act for sale or consumption, shall have been killed beyond a certain boundary of two miles around such burgh. Unless the prosecutor can prove this he cannot succeed in his action. It is not for the defender to prove that the animal was killed at the Partick slaughterhouse in order to escape from the statutory penalty. If the latter were the meaning of the section, then its provisions would be stringent and oppressive beyond what can be presumed; for in that case no one could bring in part of a carcass from Glasgow into Partick for sale or consumption without becoming liable to pay ninepence, unless he took measures to ascertain, and be ready to prove, that the ox from which the joint or even the beefsteak was taken had been killed in Partick slaughterhouse. If the Legislature had intended thus to alter the common law of evidence, it would have beyond doubt distinctly expressed that such was its intention, and would have made some provision, such as those that occur in statutes for protection for game. I must therefore hold that the *onus probandi* in such a case as the present lies distinctly on the prosecutor, in which if he does not succeed, the defender is entitled to absolvitor.

"The question therefore is, Have the prosecutors succeeded in discharging the *onus* thus laid upon them? It is proved, no doubt, that the carcasses were bought by the defender in the dead-meat department of Moore Street Slaughterhouse, Glasgow, and from that circumstance we are asked to infer that the animals had been killed there. Even if there were nothing more than this in the proof, it would be somewhat rash to come to that conclusion without further evidence, and this becomes all the more important when attention is given to the evidence of the defender. It is proved in that evidence, and it is not even attempted to be rebutted, that the carcasses of cattle killed in Partick have been often brought to Moore Street for sale. How, therefore, do we know that this has not been the fact in the present instance? It is said that it is very unlikely. That may be so; but what is required to bring a man under the very stringent provisions of section 363 is not likelihood or unlikelihood, but actual proof. It was further argued that the defender ought not to have bought and taken meat from Moore Street to Partick for sale or consumption unless he had ascertained, and was prepared to show, that the animal had been killed in Partick. This seems to me to be laying the defender under an *onus* for which the statute gives no countenance. It was maintained, indeed, that unless a presumption of this kind in favour of the prosecutor be received in cases like the present, the Commissioners will be unable to work the coercive provisions of section 363 at all. I am not prepared to say that the Commissioners, if they make proper inquiries, may not be able to get evidence much beyond this; but even if it were otherwise, that is no reason why the rules of the common law of evidence should be relaxed, or rather entirely reversed, in order that a provision seriously affecting freedom of trade should be made yet more stringent than the Legislature thought fit to make it. If the

Commissioners of Partick find that they cannot work section 363 by the rules of the common law, their only proper course is to endeavour to obtain from the Legislature a still more stringent provision, one, viz. to the effect that the mere fact of a man's bringing in butcher-meat to Partick for sale or consumption shall be conclusive against him as to its not having been killed at the Partick slaughterhouse, unless he is prepared to prove that it was so. I need scarcely say that I think it very improbable that the Legislature would give its sanction to a provision of such stringency. F. W. C."

Act.—M'Gowan.——*Alt.*—Hamilton.

SHERIFF COURT OF PERTH.

Sheriff Barclay.

DODD *v.* CALEDONIAN RAILWAY COMPANY.

Weights and Measures Act—Steelyards—Stamped weights.—The complaint was at the instance of John Dodd, chief constable of the county of Perth, as Procurator-Fiscal for the purposes of the Weights and Measures Act, 1878, against the Caledonian Railway Company and David Sim, their agent at the Luncarty Station, who were charged with a contravention of the 24th, 28th, and 29th sections of the above-mentioned Act, by having on their weighing-machines at Luncarty Station a number of weights not of the Board of Trade standard; none of them with the denomination of such, nor stamped as such on the top or side, and none of them having been verified by the inspector of the county as correct. None of the pieces of metal used on any of these steelyards are standard weights, nor do those using them pretend they are so; and when evidence was led it was shown to the Court by engineers and machine-makers that these slips of metal are but parts of that class of weighing-machines, and the accuracy of the machine does not depend to any extent on using on the lever a stamped weight of any imperial denomination. The following is the Sheriff's interlocutor and note, which fully explain the details of the case:—

"*Perth*, 17*th September* 1879.—Having heard parties' procurators, and made avizandum with the complaint, proof, and debate, Finds that the defenders, at the railway station at Luncarty, the property of the Caledonian Railway Company, of which the respondent, David Sim, is station-master, had in their possession for use, and did use, certain pieces of metal as weights for the ascertainment of the weight of goods, wares, or merchandise to be sold, delivered, or carried by weight: Finds that the said pieces of metal are not of the denomination of some Board of Trade standard, and have not the true denomination of weight stamped on the top or side thereof, and have not and cannot be verified and stamped by an inspector with the stamp of verification: Finds the respondents, therefore, have severally contravened the statute libelled; and therefore convicts them jointly and severally in the modified penalty of £2, with expenses, and forfeits the pieces of metal seized, reserving to issue warrant for recovery of the penalty and costs, and decerns.

"Hugh Barclay.

"*Note.*—At the hearing of the case it was observed by the defenders, or rather by their witnesses, that if a judgment is given adverse to them it will involve millions of capital invested in steelyards similar to that at Luncarty, and put a stop to the whole commerce of the country. The Sheriff-Substitute can scarcely believe in such extravagant results; nevertheless, should such follow, he cannot help himself if the law binds him. *Fiat justitia ruat cœlum.* If such national calamities are the result, an application to the Legislature is sure

to obtain a suitable remedy. An Act may be speedily obtained which may legalize railway steelyards, and exempt them from the Act of Uniformity of Weights and Measures, and from inspections by the county officer. It has been long the wise rule of law to enforce uniformity and accuracy of weights and measures, so as to obtain equality in fair dealing. Even ancient Scriptures give sanction to this important principle of justice, for it is written 'that a false balance is an abomination to the Lord, but a just weight is His delight.' The Romans placed weights and measures under the superintendence of their Ædiles, who exercised a strict scrutiny over them. To this wondrous people we are indebted for the steelyard; but such was a simple apparatus, seen and understood by all ranks. It was not as the one in question, where the beam is made to subserve both weights and balance. Even so far back as Magna Charta in England, uniformity in the standards was sought as a grand national right. In Scotland, many are the statutes authorizing uniformity of weights and measures. The Act 1607 is a relic of our ancestors' wisdom, and sets forth that sensible prejudice seen and felt through many parts of the kingdom by reason of the diversity of measures and weights used within the same. The successive Acts of Uniformity in modern times have had the same introduction as is in the existing statute, that 'the same weights and measures shall be used throughout the United Kingdom,' and (sec. 19) that all transactions shall be made according to one of the imperial weights or measures, or of some multiple or part thereof, and every person who sells otherwise shall be liable in a fine; and again (sec. 24), that every person who uses or has in his possession a weight or measure which is not of the denomination of some Board of Trade standard shall be liable to consecutive fines; and once more (sec. 28), every weight shall have its denomination stamped thereon, and, if not in conformity to the statute, shall not be stamped; and (sec. 29) every person who uses, or has in his possession for use, a weight not stamped shall be fined, and forfeit the unstamped weight. Such are the clear and positive terms of the existing statute, and the Courts under former Acts have decided that no weights are legal save those stamped by the inspector, and subject to his inspection. Oft and again attempts have been made to introduce local standards, but the law has ever been jealous against such, and zealous to enforce uniformity. The first case in date was in this Court on 27th June 1871. Strange to state, the case was at the instance of the chief constable against the same company and their then station-master at Luncarty—the identical station the subject of this complaint. The plea in that case was not so much that now set forth, but that the Railway Company Acts superseded the uniformity statutes, and excluded the surveillance of the county inspector. The Sheriff-Substitute has read his notes in that case, and sees no occasion to modify them in the least. He observes that the same evidence as to the superiority of Pooley & Co.'s machines was set up in that case. But it appeared in that case, as it does in the present, that steelyards can be, and are, made on the principle of being worked by imperial weights, and that the inspector can discover the accuracy of the beams and its just results. In the report of the newspapers of the day it was stated that the company promised to abandon the use of the mysterious machine and adopt the balance more commonly used, and which could be inspected by the proper officer. The second case in date is *Patterson* v. *Robertson*, 8th September 1871. The complaint was that weights were used at an ironstone pit for regulating the wages of miners. It is reported 2 Couper, 131, and 44, Jurist, 1. The conviction of the Sheriff was confirmed by Lords Justice-Clerk and Deas. The latter remarked, 'The penalty is exigible for either using any weight or measure other than those authorized by the Act, or using any weight or measure which has not been stamped in terms of the Act.' The last authority in date is 26th Sept. 1872, where a conviction by the Magistrates of Dunfermline was confirmed by Lord Jerviswoode at Perth Circuit. The goods agent of the Dunfermline Railway Company was convicted under precisely similar circumstances as in the present instance. The same plea was urged as here,

that the metal pieces complained of were not weights in the sense of the statute, but parts of the steelyard or machine. There is an English decision that a balance-ball removable was no part of the machine, and therefore illegal (*Carr* v. *Stringer*, L. R. 3, Q. B. 433). The admitted facts of the present case is that the pieces of metal objected to were ten in number. They were of the actual weights undernoted, and when used represented the several weights hereinafter set opposite their actual weights :—

1.	8 lb. 2 oz. 1 dr.	1 cwt.
2.	4 lb. 1 oz. ½ dr.	56 lb.
3.	2 lb. ½ oz. ½ dr.	28 lb.
4.	15 oz. 14 dr.	14 lb.
5.	8 oz. 2½ dr.	7 lb.
6.	4 oz. 10½ dr.	4 lb.
7.	14 oz. (a sliding weight)	...
8.	8 lb. 2 oz. 9 dr.	1 ton.
9.	8 lb. 2 oz. 9 dr.	1 ton.
10.	4 lb. 1 oz. 5 dr.	10 cwt.

The plea in defence in this case was that the pieces of metal complained of and seized were not weights in the sense of the statute, but merely parts of the machine, beam, or lever. These articles certainly are used as weights. When the defenders' witnesses were pressed as to what the pieces of metal could be called, they answered that they were 'proportional weights.' These weights are unstamped, and cannot be stamped, because their denominations marked severally on them are erroneous and false. It is no answer to say that by an ingenious device of machinery, underground and unseen, each give a certain result at the other end. The same might be obtained by placing a horse-shoe or a stone on the scale. Indeed, there is no doubt but in ancient and rude times stones were actually used as weights. This is still to be traced in the name of one of the legal weights, the 'stone,' as 'foot' is still a denomination of lineal measure. The objection to the defenders' scheme is that it requires a skilled mechanician at periodical times to examine and adjust the balance. It is beyond the power of the county and legal inspector to perform that duty, being beyond his skill. Thus the important department of railway transactions is put under the control of a private and irresponsible person, whose interest it is to proclaim the perfection of his employers' beams, and who even may be susceptible of bribery. The object of the law is that every person have an opportunity of seeing an imperial weight placed in one scale and the corresponding quantity placed on the other side, with the pointer midway in the beam. There is the additional security, that the Government Inspector can at any time, without notice, test the weights and the beams, and thus protect the public from every attempt at unfair dealing. It is, perhaps, pleasant to find that in the march of science a simpler, more speedy, and scientific mode of weighing can be obtained than the more rude methods of our fathers, but the general public must be protected in all their dealings with just weights and balances, patent and open to the eyes of the most vulgar, and not by subterranean appliances, however nice and accurate science may establish them to be. H. B."

Act.—Mitchell.——*Alt.*—Skeete.

An appeal to the High Court of Justiciary has been taken.

SHERIFF COURT OF RENFREWSHIRE.

Sheriff FRASER.

THE KINNING PARK PROPRIETORS *v.* THE POLICE COMMISSIONERS OF KINNING PARK.

Held that the owners of houses, having put the streets in front of their property in good repair, upon the demand of the Commissioners of Police of a

burgh constituted under the General Police Act, 1862, the Commissioners were thereafter bound to take over these streets and maintain them in future at the expense of the rates. *Opinion* by the Sheriff that the words "it may be lawful" in a public Act of Parliament having reference to matters for the public benefit, are obligatory upon statutory trustees, and the word "may" means "must."

The facts of this case upon the construction of the General Police Act are fully stated in the note by the learned Sheriff. The case is of some practical importance with reference to the numerous burghs that are being called into existence under the General Police Act. We understand that the decision of the Sheriff of Renfrewshire has been acquiesced in, and we therefore publish the judgment as a good commentary upon certain obscure clauses of an obscure Act of Parliament.

"The Sheriff having considered the proof, productions and whole process, and heard the parties, sustains the appeal for the appellants, Robert Wotherspoon & Co., quashes the order of the Commissioners dated 'Burgh Chambers, Kinning Park, 18th December 1878,' and signed by Wm. Lucas, Clerk to the Commissioners of Kinning Park, with reference to Park Street and Stanley Street in said burgh : Finds the appellants entitled to expenses.

"PATRICK FRASER.

"*Note.*—The burgh of Kinning Park was constituted a burgh under the General Police and Improvement Act, 1862, in the year 1871. Commissioners were appointed under the statute, and entered upon the performance of their duties in November 1871, when the first election took place. One of the first duties of the Commissioners was, of course, to get the streets of the burgh put into a proper condition; and on 28th December 1871, at a meeting of the Commissioners, they instructed the clerk 'to request Mr. Copland, surveyor, with the utmost despatch, to prepare survey, and report as to the work required' to put certain streets therein referred to into proper repair. At their next meeting, on 11th January 1872, the Streets and Buildings Committee (which had been appointed at the first meeting of Commissioners) received a report from Mr. Copland upon certain streets, including therein Stanley Street and Park Street. 'After duly considering the same it was unanimously resolved to recommend a substantial system of rubble causeway as a standard for the streets in the burgh (crossings excepted), which should be formed of square dressed causeway.' The resolutions of the Streets and Buildings Committee was communicated to the Commissioners on the 18th January, and a motion was carried that the recommendation of the committee be adopted, and that the interim clerk be instructed to issue notices to the proprietors of the properties fronting or abutting on the streets named in Mr. Copland's report, calling upon them 'to have the same causewayed in terms thereof, with such traps and crossings as the committee shall think necessary; and that Park Street have a stone bottom in addition to the rubble causeway.' This resolution to causeway the streets was just what the Commissioners ought to have passed, and it was passed in terms of the powers conferred upon them by the statute. The 150th section of the statute enacts 'that where any private street or part of a street is, at the adoption of this Act, formed or laid out, or shall at any time thereafter be formed or laid out, and is not, together with the footways thereof, sufficiently levelled, paved, or causewayed and flagged, to the satisfaction of the Commissioners, it shall be lawful for the Commissioners to cause any such street, or part of a street, and the footways thereof, to be freed from obstructions, and to be properly levelled, paved, or causewayed, and flagged and channelled, in such way and with such material as to them shall seem most expedient, and no such street shall be considered to have been sufficiently paved or causewayed and flagged unless the same shall be completed with kerbstones and gutters to the satisfaction of the Commissioners.' The persons who are to pay for these operations are found in the 151st section, which imposes the whole of the charges, costs, and expenses on the owners 'of the lands or premises fronting or abutting on each street, in proportion to the extent of

their respective premises fronting or abutting on such street, as the same shall be ascertained and fixed by the Commissioners or their surveyor.'

"In virtue of the powers so conferred upon them, the Commissioners of Kinning Park issued a printed notice, whereby, professing to exercise the powers conferred upon them by the General Police and Improvement (Scotland) Act, 1862, they intimated to the owners of the lands fronting or abutting (among others) Stanley Street and Park Street that they (the Commissioners) had resolved upon causewaying these streets with substantial rubble causeway, and as regards Park Street, on a stone bottom, conform to a specification prepared by their surveyor, Mr. Copland; and they further intimated that the whole costs and charges of these operations would fall to be paid by the said owners, at the same time informing the owners that 'relief will be granted to each owner who shall have timeously and to the satisfaction of the Commissioners executed the operations and repairs effeiring to his own proportion of the said streets.'

"This notice was in accordance with the statute, and could only have been issued in virtue of the powers which the statute conferred. It produced, very naturally, some commotion among the owners of property who were to be so assessed. They had meetings upon the subject, and the result of these meetings was that they intimated to the Commissioners that in order to have uniformity in the works to be carried through, and in order to avoid any dispute as to the sufficiency of the works when completed, the Commissioners themselves should carry them out—as they had intimated they would do—and that the owners would not take advantage of the permission given to them in the notice, of themselves executing the work.

"The Commissioners agreed to this. A specification of the work to be done was prepared by Mr. Copland. A contract for the execution of it was entered into with a contractor, Mr. Rankin, by whom the works were duly completed sometime in 1873 or 1874, and he was finally settled with in 1875. There was a delay in the settlement with him in consequence of a dispute between him and the Commissioners about money matters, which was made the subject of a reference; but in 1875 the whole matters were arranged, and a final allocation of the assessment was made upon the various proprietors. There had been a previous partial allocation, but the final allocation was made in 1875; and the whole sums payable by the owners of the streets for paving and causewaying them, as resolved upon by the Commissioners, have been duly paid.

"As soon as practicable after the dispute with Rankin was settled, a petition was presented to the Commissioners to take over Park Street and make it a public street, in terms of section 154 of the statute. This was upon 9th September 1875, but the Commissioners leisurely disposed of it only upon 10th January 1876, by a resolution to the effect 'that the Commissioners are not in the meantime in a position to take over Park Street.' Why they were not in a position to take it over, after the whole of the operations by their own contractor were completed and taken off his hands, and after the assessments were laid upon the owners and paid, they have not explained. But the result was that they evaded performing what the statute imposed upon them as a duty, viz. then and there to have taken over Park Street, and recognised it as a public street. So matters remained until April 1876, when another petition was presented to them requiring them to take over Stanley Street, Park Street, Great Wellington Street, and Suffolk Street, and maintain them thereafter as public streets. These were all streets that had been causewayed in terms of the resolutions of the Commissioners themselves, by their own contractor, and for the causewaying of which the owners had duly paid their assessment. After this petition had been before two meetings of the Commissioners, and the disposal of it twice delayed without any reason assigned, it was disposed of on 8th June 1876, by a deliverance in the following terms: 'The Commissioners of the burgh of Kinning Park having considered the above petition, refuse the prayer thereof *in hoc statu*.—(Signed) THOS. DICK, Senior

Magistrate.' Provost Dick, who signs the deliverance as the chairman at the meeting, was examined as a witness, and he discloses the causes of the somewhat inexplicable conduct of the Commissioners in their whole proceedings as follows: 'The refusal of the petition in June 1876, by the deliverance which was signed by me, was not in consequence of Stanley Street and Park Street being then in a state of disrepair, and unfit to be taken over, but the majority of the Commissioners did not want to take over the streets in any case, so as to impose a burden to keep them up on the ratepayers. The majority of the Commissioners in June 1876 was composed of persons who were not proprietors liable to assessment.' It has been the misfortune of this burgh that the dominant party among the Commissioners are of the class referred to by Provost Dick, who wished to escape a just taxation by a public rate, for keeping up streets that ought to have been made public, leaving the burden (if so it could be managed) upon persons, the owners of property, who had already discharged their statutory obligations of paying for the paving and causewaying.

"The question then arises, what construction is to be put upon the 154th section of the statute, which is in the following terms: 'If any private street shall at any time be made, paved, or causewayed or flagged, and put in good order and condition, to the satisfaction of the Commissioners, then, and on application of any one or more of the owners of premises fronting or abutting upon such street, it shall be lawful for the Commissioners to declare the same to be a street as defined in this Act, and for ever afterwards vested in the Commissioners, and shall, with the exception of the footway, be repaired and repairable by the Commissioners under the authority and powers of this Act.'

"That the streets in question were put in good order to the satisfaction of the Commissioners is a fact proved in this case. They took over these streets from the contractor as being sufficiently paved and causewayed. He maintained them for six months after his contract was taken off his hands, and tells us that 'after I had completed the work, one man kept regularly on, with the occasional assistance of a labourer, would have been sufficient to have kept the streets in good condition;' but the majority of the Commissioners, who represented those who had to pay rates, and not owners, left the streets to themselves, and Mr. Geo. Lindsay, one of the Commissioners and bank agent, described the result thus: 'After Rankin went away, and ceased to take charge, no repairs were effected upon the streets by any one. They fell into a state of disrepair and ruts. No one was looking after the streets in the way of repairing them after Rankin went away in 1873, excepting in the way of cleaning them,' and the result is, as admitted by both parties at the close of the proof, 'that the streets at the time the order was made by the Commissioners in 1878 were in a state of disrepair, and required to be repaired.'

"The question now is whether the owners of the properties, who paid for the paving and causewaying under the statutory notice of 1872, and who, after the dispute with Rankin was settled and the assessment allocated, required the Commissioners to take over the streets as public streets, can be again served with a statutory notice to pave and causeway them once more in terms of the notice which is made the subject of the present appeal. The Sheriff is of opinion that they cannot, and he has therefore (acting under the jurisdiction conferred upon him by the 396th section) quashed the order of the Commissioners. The point turns upon this —whether the words 'it shall be lawful,' in the 154th section of the statute, confers a discretion upon the Commissioners to do as they please as to taking over the streets, or whether it imposes an obligation which they must comply with. The latter is the construction which the Sheriff puts upon the statute. The general purpose of the statute is to equip this burgh with all those requisites without which it would not deserve the name of burgh; and surely the most prominent thing that one would desiderate in a burgh is *public streets*. But it has been determined, with reference to this very burgh, that so long as the streets remain private, the owners of the property fronting them

are entitled to put up barricades, and prevent all ingress and egress by carts and carriages, except to or from themselves (*Kinning Park Commissioners* v. *Thomson*, 22nd February 1877, 4 Rettie, 528). Therefore, when it is said in the 154th section that *it shall be lawful* for the Commissioners to take over private streets which they have compelled the owners of houses to pave and causeway to their satisfaction, this must mean that the obligation of the owners has been discharged, that the obligation of the general ratepayers then begins, and that the streets *must* be taken over when a demand to that effect is made under the statute, and thereafter maintained as public streets, at the expense of the ratepayers, without any right on the part of the Commissioners to insist upon the owners once more doing what they had already done, viz. paving and causewaying a second time—rendered necessary by the negligence or the reluctance to tax themselves of the general ratepayers.

"That the words 'it may be lawful,' with reference to such a statute as this, may mean 'must,' or 'shall,' is borne out by many authorities. Similar words in the General Turnpike Act were thus interpreted by the Lord Justice-Clerk (Inglis) in *Walkinshaw* v. *Orr*, 28th January 1860, 22 D. 631. By the 61st section it is enacted 'that the trustees of all turnpike roads shall have power, and they are hereby authorized to widen and extend all such roads, so that the same shall be in all places 20 feet in width of clear passable road.' 'Such words as these,' said the Lord Justice-Clerk, 'are capable of two constructions according to the subject-matter and the context. They may mean either that the parties invested with the power may exercise it or not, according to their discretion, when the circumstances occur in which it may be exercised, or that in those circumstances they are bound to exercise it. Now, I hold it to be a general canon in the construction of statutes that where powers are conferred in a statute for the public benefit, they must be exercised, and the enactment is imperative. This is a case in which the power is given clearly for the public benefit, and therefore *prima facie* it appears to me an imperative enactment.' The doctrine is thus stated by Sir P. B. Maxwell in his treatise on 'The Interpretation of Statutes:' 'When a statute confers an authority to do a judicial, or indeed any other act which the public interest *or even individual right may demand*, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having a right to make the application' (per Cur. in *M'Dougal* v. *Paterson*, 2 L. M. and P. 687, 11 C. B. 755). 'In giving one person authority to do the act, this statute impliedly gives to others the right of requiring that the act shall be done, the power being given for the benefit, not of him who is vested with it, but of those for whom it is to be exercised '(per Cur. in *The Supervisors* v. *U. S.*, 4 Wallace, 446). The Legislature in such cases imposes a positive and absolute duty, and not merely gives a discretionary power, and it must be exercised upon proof of the particular facts out of which the power arises (per Cur. in *M'Dougal* v. *Paterson*, *ubi supra*). When, therefore, the language in which the authority is conferred is only directory, permissive, or enabling—for instance, when it is enacted that the person authorized 'may' or 'is empowered' or 'shall,' if he deems 'it advisable' (*The Supervisors* v. *U. S.*, *ubi supra*), or that it 'shall be lawful' for him to do the act, it has been so often decided as to have become an axiom that such expressions have a compulsory force (per Cur. in *R.* v. *Tithe Commissioners*, 14 Q. B., 474), unless there be special grounds for a different construction. This doctrine has been exemplified in a number of cases. Thus, where an Act empowered a vestry to make a paving rate, and provided that when it appeared to the vestry that the rate was not incurred for the equal benefit of the whole parish, it *might* exempt the parts not benefited, was held to impose on them the duty, and not merely to confer the power of apportioning the burden (*Howell* v. *London Dock Coy.*, 8 E. and B. 212, 27 L. J. M. C. 177).

"The County Courts Act (13 and 14 Vict. c. 61, sec. 13) provides that, where an action is of the description therein referred to, the judge 'may' direct that the plaintiff recover his costs. It was held that this conferred a power upon the

Court to grant costs, which was imperative in cases falling within the section (*Crake* v. *Powell*, 21 L. J., Q. B. 183).

"In a case in the Courts of New York, stated in 'Smith's Commentaries on Statute and Constitutional Law' (p. 729), it was held that the Act, to reduce several laws relating particularly to the city of New York into one Act, in which it was provided that 'it *shall* and *may* be lawful for the mayor, aldermen, etc., to cause certain acts to be done relative to sewers and drains,' etc., was a statute of public concern, and related to the public welfare; and that the words '*shall* and *may*,' although permissive merely in their terms, must be regarded as peremptory on the Corporation—that when the public interest called for the execution of the power thus conferred the Corporation were not at liberty arbitrarily to withhold it. The exercise of the power became a duty which the Corporation were bound to fulfil. Nelson, Ch.-J., after citing several cases in support of this principle, says, 'The inference deducible from the various cases on this subject seems to be, that where a public body or officer has been clothed by a statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted upon as a duty, though the phraseology of the statute be permissible merely, and not peremptory.'

"The Commissioners of Kinning Park say that they are now willing to take over the streets if these be once more put into good repair. They are no more bound to do so at present than they were in 1876; and why they have yielded now and refused in 1876 they have not explained. They have a plain public duty laid upon them which concerns the public very materially, in respect that unless they make the streets public, with the consequent liability following upon such an act, they will remain barricaded and useless to the burgh. In the exercise of that public duty private parties also whose houses front the streets have a most material interest, and such interest gives them a title to insist that the duties shall be discharged. If the Commissioners refuse to perform it they will find that they can be compelled to do so, and no better or more apt statement of the power of the Court in this respect need be cited than that of Lord Cowan in *Beckett* v. *Campbell* (22nd Jan. 1864, 2 Macph. 486), a case, however (the opposite of the present one), in which the Court, construing a statute, held that the words employed were not mandatory and imperative, but left a discretion in the Road Trustees.

"The Sheriff, therefore, is of opinion that the Commissioners of Kinning Park ought to have taken over Park Street as a public street in September 1875, and ought to have taken over Park Street and Stanley Street in April 1876, when they were asked to do so. The delay in making the application for this purpose has been satisfactorily accounted for by the dispute with Rankin, and by the non-imposition and allocation of the assessment till that dispute was ended. P. F."

Notes of English, American, and Colonial Cases.

MARINE INSURANCE.—*Total loss—Salvage and costs—Refitting—Insurable interest.*—By agreement between the plaintiff and W., the plaintiff undertook at his own expense and risk to transport the Cleopatra obelisk from Alexandria to London, and there to erect it uninjured. In the event of success W. was to pay the plaintiff £10,000, but in the event of failure, the plaintiff was to incur no liability to W. It was calculated that the £10,000 would no more than cover the expenses. The obelisk was delivered to the plaintiff by the Khedive of Egypt for the purpose of conveying it to London; the plaintiff expended money and labour in preparing for the transport, and built a vessel called the *Cleopatra*, which was little more than an iron case, in which the obelisk was stowed, and in which it would float, and agreed with the owners of the steamship *Olga* to tow

the *Cleopatra*, with the obelisk on board, from Alexandria to London for £900. After payment of this sum the plaintiff had expended in all £4000 on the transport, etc. The plaintiff next effected two policies of insurance, against total loss only, with the defendants respectively, the first of which, with the defendant Whitworth, was for £1000, "upon the goods and merchandise in the good ship *Cleopatra*, iron vessel, containing the Cleopatra obelisk. The goods and merchandises, etc., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at £4000." The second policy with the Sea Insurance Company was for £2000, "upon any kind of goods and merchandises, and also upon the body, etc., of and in the good ship *Cleopatra*, iron vessel, containing the Cleopatra obelisk. The said ship, etc., goods and merchandises, etc., for so much as concerns the assured by agreement between the assured and the company in this policy, are and shall be, vessel and obelisk, valued at £4000." The suing and labouring clause in both policies was as follows : "And in case of any loss or misfortune it shall be lawful for the assured, their factors, servants, and assigns, to sue, labour and travel for, in and about the defence, safeguard and recovery of the said goods and merchandise, or part thereof, without prejudice to this insurance, to the charges whereof the assurers will contribute each one according to the rate and quantity of his sum herein assured." The *Cleopatra* and the obelisk left Alexandria in tow of the *Olga*; a severe storm was encountered in the Bay of Biscay, when the *Olga* was compelled to cast off the *Cleopatra* and take her crew on board. The following day the *Cleopatra* was lost sight of, and after vainly endeavouring to find her, the *Olga* came on to England without her. Subsequently the steamer *Fitzmaurice* fell in with the *Cleopatra* and succeeded in towing her into Ferrol, a neighbouring port. The Court of Admiralty awarded £2000 salvage to the *Fitzmaurice*; the plaintiff had to pay—first, the salvage; second, the costs; third, certain expenses in refitting the *Cleopatra* at Ferrol, and towing her thence to London. The plaintiff now sought to recover from the defendants the several amounts under these heads of expense:—*Held*, that both policies were on the ship and obelisk, and that the plaintiff had an insurable interest in each to the extent of £4000, which was sufficiently described in the respective policies. That the defendants were liable to the plaintiff for the £2000 paid as salvage; for, though the policies were against the risk of total loss only, the *Cleopatra* was only saved from total loss by the services of the salvors, and the defendants, therefore, having had the benefit of their services, were bound to indemnify the plaintiff against his liability in respect of them, and that each of the defendants were bound to contribute in proportion to the amount subscribed by them. That the defendants were not liable to the plaintiff for the costs of the Admiralty proceedings, or the expenses of refitting the *Cleopatra* at Ferrol and towage from thence to England, such costs and expenses being too remote to be covered by the policies.—*Dixon* v. *Whitworth*. *The Same* v. *The Sea Insurance Company*, 48 L. J. Rep. C. P. 538.

RAILWAY COMPANY.—*Passenger travelling without having paid his fare—Tourist ticket—Intent to avoid payment of fare.*—The respondent was charged under 8 Vict. c. 20, s. 103, with travelling in a third-class carriage of the Great Western Railway without having previously paid his fare and with intent to avoid payment thereof. The respondent was found at Neath on the 18th of November 1878, in a third-class carriage on his way to New Milford, and produced to a ticket examiner at Neath the forward half of a tourist ticket, dated the 28th of September 1878, and available for two months. The ticket in question, which was not transferable, had been issued from Ludlow to New Milford to A., from whom the respondent had purchased the forward half for a sum considerably less than he would have had to have paid for an ordinary single third-class ticket. There was evidence to show that the respondent intended to defraud the railway company:—*Held*, that there had been a violation of the conditions under which the ticket was issued, and that the respondent was liable under the circumstances to be convicted under 8 & 9 Vict. c. 20, s. 103, for travelling without having paid his fare.—*Langdon* v. *Howells*, 48 L. J. Rep. M. C. 133.

THE

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THE LAND QUESTION, IN ITS SOCIAL AND POLITICAL ASPECTS.

Professor LORIMER's Introductory Lecture to the Class of Public Law in the University of Edinburgh, November 1879.

THOUGH bearing the title of Professor of Public Law as well as of the Law of Nature and Nations, it has been in the latter capacity, without any exception I believe, that in former years I have addressed my class at the opening of the session. Two reasons have induced me to adopt this course. The first is, that there is another professor, and a very efficient professor, into whose hands the *jus publicum*, in its municipal sense and in its technical aspects, naturally falls—I mean the Professor of Constitutional Law and History. The second is, that public municipal law lies somewhat dangerously near to the region of party politics, a region which I have always studiously avoided. On the present occasion the two subjects, in this latter respect, have changed places. We are approaching a general election, the issues of which will mainly turn on the foreign policy of the Government. The question will be raised, whether the recent policy of this country, in supporting the dominion of a Mohametan power over the Christian races in Eastern Europe and Western Asia, is to be persevered in or abandoned. Alongside of this exciting and agitating topic, on which few men can at present speak with temper and patience, there has sprung up another question of the gravest national concern which all intelligent and well-intentioned persons, in this country, are still happily able to approach with calm and dispassionate consideration. I limit this assertion to our own country and to the present time, because in the sister kingdom of Ireland the land question has long been that which rouses more furious passions than any other, and it everywhere touches so many traditions and prejudices, and affects the fortunes of so many individuals and classes of individuals, that, unless it can be successfully dealt with now, it is doubtful whether we ourselves will long be able to contemplate it with soberness. To myself personally,

moreover, it is interesting beyond what it can be to the generality of those whose fortunes are not directly embarked in it; for I was born and spent the beginning of my life, as I shall probably spend the end of it, amongst men who were engaged in rural pursuits. In these circumstances my learned colleague, I am sure, will pardon me if I encroach for once on the preserve which I usually abandon to him, and try to look at this topic, not so much from the economical point of view, from which it is generally regarded—a point of view in which another learned colleague, the Professor of Political Economy, may lay claim to it—as in those social and political aspects in which it is not less important to our national wellbeing. To see it aright from any one point of view, exclusively, is indeed impossible; for it is as an economical question mainly that its political and social importance can be measured, and it cannot be solved as a legal or legislative question, unless its political, economical, and as the root of all, its social and moral bearings are kept clearly in view.

The truth of this remark has been terribly emphasized to us by the example of Ireland, where the social fabric has been shaken by it to its foundations, and where, as a political factor, it has frequently threatened to tear asunder the union of the three kingdoms. Yet it is a remark to which, I fear, sufficient prominence is seldom given in this country. If one may judge by the vast preponderance of the purely economical over the social and political topics prescribed for investigation to the Royal Commission which has just been appointed, it would seem that it is as an economical problem almost solely that the land question presents itself to the Government; and it is in this form, with few exceptions, that it is discussed in the newspapers and other periodicals. In illustration of what I mean, let me mention, at the outset, one single all-important question which seems constantly to be omitted; the question, namely, what system of tenure or mode of culture will maintain the greatest number of persons in wellbeing *on* the soil? In judging of the various arrangements adopted in this and other countries for the distribution of the land amongst its inhabitants, the test is always the amount of produce which they yield, or are supposed to yield, meaning by produce food which is carried away to support the town populations, and not food which is consumed by, or shelter afforded to, the rural populations on the spot. If two farms of equal size, one of which is worked by five men and the other by ten men, send the same amount of grain to the market, a saving of the value of the labour of five men is supposed to have been effected on the former. Against this gain the cost of the machinery by which, to some extent, it was effected, will no doubt be put, but the saving which still remains will be unhesitatingly scored up as pure profit, not to the farmer alone, but to the whole community. The affair, however, is vastly more complicated, as we shall speedily perceive if we trace the history of

the five men who were formerly housed and fed on the land. If they emigrate to a colony where land is cheaper, and labour, of the kind to which they have been trained, is more highly remunerated, their condition may be substantially improved; and emigration is certainly the best, if it be not the only means by which any pressure on the resources of this country occasioned by over-population can be alleviated. But emigration is for the young and the enterprising. Let us suppose that the fate of our five men is the more ordinary one, and that they simply go to crowd still further the nearest manufacturing town. That the occupations to which they go—supposing them to procure occupation—and the other conditions of existence by which they will be there surrounded, are less conducive to their physical health than those which they have abandoned, is a fact but too well established by the comparative death-rates in town and country which every report issued by the Registrar-General proclaims. The difference in some cases rises, I believe, to a third. But say that it is a fourth: each of these five men loses a fourth of the days which would otherwise have remained to him, and his children lose a fourth of their existence. But the loss, say the admirers of town life, is compensated by the higher wages and increased opportunities of enjoyment and culture which fall to the share of the inhabitants of towns. Though their life is shorter it is merrier. Gentlemen, I doubt very much whether short lives in general are merry ones; for what shortens life is disease, and disease is not a source of additional merriment to those who experience it. Then as to the higher culture and greater general intelligence of the town populations—this I altogether deny; and no one will, I think, assert it who knows the variety of resources and the vast amount of shiftiness which is exhibited by any good rural labourer, or efficient country tradesman, as contrasted even with a highly skilled town mechanic. Beyond his own trade the latter generally is as shiftless as an infant in arms; whereas the former knows half-a-dozen trades, not very perfectly it may be, but to an extent that is often surprising and gratifying to those who have occasion for his services, and which greatly develops his own faculties. He can handle all kinds of tools;. he knows about animals and plants and soils and minerals, as no board school could ever teach him; and, whatever his subsequent occupation may be, he is a born groom and gardener and forester and gamekeeper. Without entering upon the moral phase of the question then, regarding which more might be said, I daresay I may assume that our five men are not likely, themselves, to be gainers either physically or intellectually by any territorial arrangements, the effects of which may be to drive them from the country into the town. But if the country is overpeopled, it may be said, does not the rest of the community gain by a process which, by shortening the lives of some of its members, diminishes their numbers? This were a heartless solution of the

problem of over-population even if it were an effectual one. But such is far from being the case; for, by a singular law of nature, the marriage-rate and the birth-rate keep place with the death-rate, and the diseases engendered by city life generate the victims on which they feed. Even if death were more sudden amongst the town populations something might be gained; but I am not aware that the period of inefficiency which precedes dissolution is shorter in the town than in the country, or that the means of supporting decrepitude or alleviating suffering are greater. Poorhouses and hospitals are not peculiar to towns; but even if they were, the best-appointed hospital and the best-governed poorhouse are sorry substitutes for a cottage of one's own, with the squire's mansion or the minister's manse within cry; and notwithstanding all our charitable efforts, more men and women probably die unfed and untended in the Cowgate every year than in all the rural districts of Scotland.

But I must not pursue this subject further. I have said enough to show you the grounds on which I deplore the rapid depopulation, not of the Highlands alone but of the Lowlands also, to which the Registrar-General's reports, and the roofless cottages, which we see in every locality, bear mournful testimony. We have no deer-forests in the Lowlands, it is true; but other causes are at work which produce similar effects. During the ten years which elapsed between 1861 and 1870 we are told that "a number equal to nine-tenths of the persons born in the rural districts emigrated from them, to seek a subsistence abroad, or in the principal and large towns; and that the latter was the destination of most of them is plain enough when we learn that whereas the whole Scottish emigrants, during these ten years, amounted to 157,838, the town populations were increased by no less than 239,736 persons.[1] That this evil, if evil it be, has been occasioned by those arrangements for the distribution and cultivation of the soil, which have been here developed to an extent unknown in any other country, is a fact which I believe I need not hesitate to assume; because the saving of manual labour which results from them is the main ground on which they are defended by their advocates. And as I assume the cause, I will concede the importance of the result. If agriculture is to be regarded as a mere food-producing process, apart altogether from the interests of the rural population, so far from disputing the reality of the gain effected by the saving of labour which results from the present system, I will even go the length of admitting that, if the soil of this country is to compete successfully with the soil of the Colonies and of America in this respect, it can only be by a further development of this system. We must go on encouraging the accumulation of land in the hands of single proprietors; we must increase still further the size of our farms; and we must, more and more, trust to the use of machinery and the application of

[1] Supplement to the Registrar-General's Reports of Births, Marriages, and Deaths in Scotland, during the ten years 1861-1870, pp. 4, 5.

artificial manures and the offscourings of towns. The whole land must be converted into one vast food manufactory. But that competition will be successful, even with such aids as these, I greatly doubt. The application of machinery to agriculture is not peculiar to this country, and is likely to progress in America, in our own Colonies, and even on the Continent, pretty nearly as rapidly as amongst ourselves; and as the use of manures is rendered almost superfluous by the fertility of a virgin soil, and the cost of transport by rail and sea will certainly continue to diminish, it would seem inevitable that the victory in the end must be with the possessors of the broadest and cheapest acres. Land, not machinery and manures, is the first condition of agricultural success. No superiority in skill, or industry, or capital will supply the want of land; and what we cannot increase is the area of our sea-girt home.

But it is not the question of the relative food-producing powers of this and other countries which I wish at present to raise, for that is a question on which the Commissioners who have been sent to America and to Canada will, no doubt, furnish us soon with valuable information, and which involves many considerations with which I am not competent to deal. The question which I wish to ask you, and which I think is too rarely asked, is this—Is the production of food the only, or indeed the main, object which we ought to have in view in determining the arrangements by which the soil of such a country as this can be made to contribute most largely to the wellbeing and happiness of its inhabitants? If we can get food that is cheaper, or even equally cheap, elsewhere, are we wise in devoting our own limited area, at the sacrifice of every other object, to the production of food? If man does not live by bread alone, are there none of the other conditions of his human existence which he may get out of his native land, which no other land will yield him on such favourable conditions? Now I think you will find an answer to this question without much difficulty, if you will take a stroll through the suburbs of this or any other great city, and meditate on the spectacle which you will there behold. To the south of Edinburgh, for example, in the Morningside and Newington districts, there are many hundreds of acres of rich and fruitful soil, with a southern exposure and possessing every conceivable facility for manures and markets, that grow no food at all. Not an ear of corn waves on the whole of them; and the few vegetables and the little fruit they produce are costly luxuries, that could be bought for half the price from the greengrocers. Or take a sail down the Clyde from Dumbarton to Rothesay, and look more particularly at the northern bank. The green fringe between the river and the purple mountains is rich and populous, beyond all precedent in its history. Every acre of it is worth more than the best corn-land in the Lothians, and yet it is not a corn-growing land at all, on the contrary, it is a corn-consuming land; and if you wish to see where the food comes from

that covers its bountiful tables, you must look out into the broad Atlantic which washes it in from beyond the Tail of the Bank. Now in these localities which have become, primarily, the abodes of men, if I am not greatly mistaken, we have a type of what, more or less, must be the future of all the localities of a small and populous country like this, which draws its wealth, with exceptional facilities, from half the world. It is not "Glasgow Manure" but Glasgow itself, and all our other crowded centres of wealth, which we must spread over the land; and it is not food but appetite, renewed vigour, and elasticity, mental and physical, which these centres of national life must draw in from the circumference.

But is the whole of Scotland, you will say, to be converted into villas and country residences for the town populations, to be occupied only during a portion of the year; or are the town populations to be planted permanently in the country, at what must necessarily be to them a loss of income? Neither process, I reply, will act exclusively, but both I believe to be progressive processes; and it is to their joint action, more than in any other direction, that, I think, we must look for the maintenance of the value of landed property, and the repopulation of our rural districts. Rural tastes have always been one of the strongest characteristics of our countrymen, and the tendency of the possessors of realized wealth, if not in the first generation, almost invariably in the second or third, is to seek for landed investments. It is this tendency which has raised the price of land in Holland to a much higher rate than it had reached in this country before the present depression began; and in our economical and social, just as in our political development, we are probably destined to follow our seafaring kinsmen.

Did your time permit I could state to you many other reasons for the belief which I hold that the residental value of land has not yet, by any means, reached its maximum in this country; but I see no ground of hope that either the possession or the cultivation of land for mere food-growing purposes will ever again become a speculation by which men may grow rich. In such a country as this the land is for those who are rich already, *i.e.* for those who are rich in proportion to their wants. Rents of course must fall to the point which will render farming a moderately remunerative occupation; but the proprietors of the soil must be contented to accept as part-payment for their investments, the luxury of living in the country, and the security of possessing the only commodity, on this side of time, which neither moth nor rust can corrupt, and which thieves, even in Ireland, find it difficult to steal.

So far then from looking for relief from the depression which at present weighs on the landed interest in the abolition of the class of wealthy landowners, I believe that relief can come only from an indefinite multiplication of this class. But wealthy landowners, and great landowners, are very far from being synonymous terms. A landowner with ten acres may be rich, and a landowner with

ten thousand acres may be poor; and, in dealing with this matter at all events, I believe, we must accept the hard saying of Mr. Tennyson's Northern Farmer, that "the poor in the loomp is baad." It is neither great lairds nor small lairds then, neither territorial magnates nor peasant proprietors, that we must seek to breed by our land laws; but lairds who are rich in proportion to their acres. It is all one whether their riches be the result of extraneous occupations and investments, or of frugality, industry, and moderation, exercised on the land itself. A man who lives well within his income is rich enough to be a landowner, in the sense in which I here speak of riches, whatever the extent of that income may be, and from whatever source or sources it may be derived; and if by any change of our land laws a class of peasants satisfying this requirement seems likely to be produced, that change, I think, merits the most favourable consideration. The fact that frugality is pre-eminently the virtue of this class in other countries, whereas prodigality is pre-eminently the vice of the whole of the lower classes in this country, furnishes another argument, of no slight weight, in favour of the experiment.

But there is an objection of another kind to the introduction of the system of peasant proprietary which I am sure will be fatal to it for many years in this country. Very few persons, either of the lower or higher classes, know anything about it and the vehemence of the prejudices which have sprung up against it is so great as to deprive many otherwise sensible persons of their reasoning powers altogether the moment it is mentioned. They will not listen till it is explained to them, and they themselves mix it up with the crofter question in the Highlands, and the tenant question in Ireland, and with Communism in France, and Pessimism in Russia, and talk and write such a Babel of nonsense about it that all that can be done in the meantime is to stop our ears and stuff our waste-paper baskets. Nor are its advocates one whit more rational than its opponents; for, without shirking the question at all, it is easy to demonstrate that the expectation that it will meet the depression which at present weighs on the landed interest cannot possibly be realized. Whatever may be the merits or demerits of the system for food-producing purposes as contrasted with that which at present prevails, the peasant proprietor in Scotland, viewed as a producer of food for exportation from the land, will stand to the peasant proprietor in America precisely in the same relation as the great proprietor in Scotland to the great proprietor in America; and if the Scottish peasant pays as many pounds for his soil as the American peasant pays shillings, it is impossible that they can compete on equal terms. If the object of peasants is to make rich by the production and exportation of food, they, like their betters, must go themselves, or else send their means elsewhere. They must emigrate, or invest in colonial mortgages. But there is no reason why a peasant who is rich for his wants

should not hold land in Scotland just as he holds it in Holland, or Belgium, or France, or Switzerland, or the Channel Islands; and if he will do so contentedly, and teach to others the virtues of frugality and contentment which are elsewhere exhibited by his class, we shall all be his debtors.

It is to a multiplication of greater proprietors, however, whose wealth is only partially invested in land, or at any rate in land in this country, that I rather look for the maintenance of the value of land amongst us, and I hope to see them grow yearly, from the feuars of roods to the founders of peerages. Nor does it appear to me that, for the realization of this anticipation, any very serious changes are demanded either in our laws of inheritance or in those which regulate the relations of landlords and tenants. I regard the conflicts of interest to which these relations give rise as inseparable from the relations themselves. They are not caused by legislation, and no legislation will cure them. "A terminable lease," as I have already said in this Journal,[1] "whether long or short, is essentially a bad tenure to begin with; and it has further the very grave fault that it gets worse and worse the longer it lasts. Every year that passes takes from its value, diminishes the interest of the tenant in the subject, and renders him less and less willing to expend his capital, his skill, and his affections upon it. Ceasing to cherish it as a home, or even to care for it as a residence, his whole interest in it soon comes to consist in the profit he can take out of it, or the loss he can escape in consequence of retaining it, during the remaining years of his lease. And this is the very opposite of the landlord's interest. Landlord and tenant are thus, as some one has said, in the same boat, but they are pulling in opposite directions; and it is no wonder that the bad relation which both parties honestly deplore should subsist between them. They may be good friends, and no doubt often are, in spite of this relation; but the whole effect of the lease is to set them by the ears; and we know how often they get quarrelling about game, and trespass, and roads, and drains, and fences, and fixtures, and anything and everything that may turn up. I do not believe that any enactment about payment by the landlord for permanent improvements by the tenant, even if it amounted to Tenant-Right in the fullest sense ascribed to it in Ireland, would cure this evil. The tenant would not expend on the subject whilst it belonged to a landlord, who might eject him if he chose at the end of his lease, a shilling beyond what he felt sure he would recover; and the landlord would not expend what he felt was to be for the profit of a tenant whose rent he could not raise till the lease expired. Above all, the practice of farmers renting land beyond what their capital enables them to cultivate with profit would continue; and farming would not become an occupation in which men of capital or culture would willingly engage. The valuation of permanent improvements,

[1] See *ante*, p. 250.

and still more of improvements partially exhausted, is, moreover, always a very difficult matter, and both parties are rarely satisfied with the award."

On these grounds, then, whatever the extent of holdings may be, I am deeply persuaded of the great advantages of absolute ownership, or, at all events, of permanent tenure, over tenancy in its present sense; and I sincerely trust that the processes which are at work in other countries for transforming the latter into the former may meet with no impediments amongst ourselves. Any laws which have that effect ought, in my opinion, to be immediately repealed. But to go beyond this would be to shake the whole fabric of society, and I do not think it will carry us far. Land can never be honestly taken from its present owners below its market value, and at its market value they are already offering it for sale in abundance. The land market is full to overflowing, and the price has fallen beyond all precedent. All that is requisite to bring the general wealth of the country in contact with the land is that men of all classes, and women too—for the ladies are by no means blameless in this matter—should moderate their expenditure in other directions, and learn to practise, in their varying grades, the self-denial which they admire in the modest landowners of Continental countries. There is no need for interfering with the relative preponderance of great hereditary estates; and to talk of "breaking them up" by some change in the law of inheritance, and distributing their fragments amongst new proprietors, is to talk nonsense. It is a result, were it honestly attainable, which very few persons in this country ever desired, and which at no former time was less desired than at present, when many of the holders of these estates have so nobly sacrificed their means to alleviate misfortunes which they did not cause, and which, in so far as they were not inevitable, were caused by that restless and grasping spirit of mercantile speculation which we like the Dutch, I hope, shall gradually outgrow. No other landed gentry was probably ever as popular as our own, and the bigger they are, the more the big farmers at any rate like them. But are the interests of the gentry themselves the same as those of the big farmers in this matter? Is not their security for the future, and their social and political influence for the present, prejudicially affected by the very magnitude of their possessions, and the consequent diminution of their numbers and of the numbers of the rural population who are their natural adherents? The accumulation of separate and often distant estates in the hands of single proprietors leads to that merely nominal proprietorship, and that mechanical farming for speculative purposes, which weakens the position of the gentry without putting any other substantial class in their place, and deprives the landed interest of its importance as a factor in our national life. But the remedy, which no legislation can justly force upon them, is in the hands of the great landowners themselves. Let them voluntarily divide their

estates amongst their children till rights of property and facts of possession, occupation, and enjoyment come together, and we should soon have a numerous and powerful gentry that would hold their own without the help either of faggot votes or foreign wars. Their present policy, however, is the very converse of this; and if the amalgamation of separate farms has covered the land with ruined cottages, the amalgamation of separate estates has been not less destructive to mansion-houses. In Fife subdivision of property has always existed to a greater extent than in most of the other counties of Scotland. Fife is exceptionally populous, and the social life of the county is proportionately rich and varied. Yet in the district of it in which I live, which is one of the most populous and subdivided, there are three country houses, within three miles of each other—not counting the one which I have partially repaired —that are going, or have gone to ruin within the present century. Not many miles farther off there is a fourth in the same condition, to the substantial comforts of which, at no very distant period, I can myself bear witness; and a fifth, still in excellent preservation and distinguished occupancy, I am told is doomed. And when I say "houses," I mean of course not houses only, but offices, gardens, pleasure-grounds, policies, and all the other adjuncts of complete family residences. All these places have been bought up by neighbouring proprietors, and are in process of being added on to their already extensive estates. The lands, it is true, are still there, and in most cases the trees and coverts have been preserved for sporting purposes. But their character as separate residences, or as residences, indeed, in any sense, is gone. Their domesticity, so to speak, has been annihilated. There are so many warm hearths, and so many wealthy, numerous, and cultivated households fewer in the East Neuk, and all that has come in place of them has been an accession of territorial importance to the families that remain, of so slight a kind as to be scarcely noticed by any one, either in the district or anywhere else.

Now let us analyze this process of territorial amalgamation, and try if we can distinguish between the elements in it which were inevitable, and right, and those which, if not wrong, were certainly unfortunate, and might possibly have been avoided. That those who grew rich should buy out those who relatively, at any rate, had grown poor was inevitable and right. If there was any fault at all it was probably on the part of the sellers, who, had they been more frugal and energetic, and less vain and self-indulgent, might possibly have retained their hereditary acres. On the part of those who bought there was no fault at all; for they paid the full market value at the time, and more than the lands would bring were they to sell them now. Still there was waste; for property of great value has been destroyed, the county has been depopulated, the social life of the district has been impoverished, and the "greatest happiness of the greatest number" has been disregarded. It was

right that the places should be sold, but it was wrong that they should be destroyed; and the question which concerns us here is whether or not the destruction, like the sale, was inevitable. Now there were two means, as it seems to me, by which it might have been averted. Had the passion for high returns been less, and the love of secure investments been greater in the community generally, these estates might all have been purchased, at still higher prices, by separate persons, and some of the victims of the City of Glasgow Bank in all probability would now have been prosperous Fife lairds. Or had the neighbouring squires who did purchase them, consulted what I believe to be the true interests of their families, and of their class, they might have planted in them cadets of their own, who, like suckers from the parent stems, would in time have grown into stately trees. It is in a return to the patriarchal, as opposed to the plutocratic conception of grandeur on the part of the aristocracy, and indeed of all the possessors of realized wealth, that we must look for that increased interest in the land of this country which alone can sustain its value when its cultivation for food-producing purposes ceases to be remunerative. Whether this object would be promoted by the abolition of the laws of primogeniture and entail is a very difficult question. The point is one that depends on a principle which we must study hereafter, and which for the present I can only indicate, *i.e.* that real substantial proprietorship being dependent on actual occupancy, the proprietary powers of the individual are limited, and that a family may hold, really and substantially, an amount of property which when centred in any single member of it can be held only nominally and fictitiously. Possession is proverbially said to be nine points of the law, and possession implies occupation by the possessor himself. A mere title-deed, till strengthened by personal possession, is like a flag planted on an unoccupied territory; and if we wish to convince ourselves of the feebleness of the resistance which it offers to the present tendencies of positive legislation, we have only to reflect on what would be the consequence if all the title-deeds in Scotland were collected in a single charter-chest. Can any man doubt that we should have compulsory redistribution, in some form or other, the very next session of Parliament? Now an "eldest son" can no more swallow up his own family than he can swallow up all the families of the land. But equality, whether of possessions or of positions, is as little realizable within the family as beyond it; and I see no reason why one member of a family should not be selected to act as its centre, or any better principle of selection than that of primogeniture. If titles of honour are to be hereditary they must follow some law of descent, and for them at any rate no other seems so eligible as that of their transmission to the eldest male. It is not the abolition of the law of primogeniture, then, but its modification which seems the appropriate remedy for the evils we have discovered; and if they are to be dealt with legislatively at all,

a prohibition might be enacted against any single child inheriting more than twice, or, in the event of his being a Peer, three or four times as much as any other member of the family. The effect of such an arrangement, I believe, would be gradually to diffuse, not the wealth only, but the personal influence of the great landed families much more widely, and to relieve them from that position of impotent isolation into which, quite involuntarily on their own part, they so often drift. Many more of them than at present would then probably take to the cultivation of their own lands, and we should thus attain to the conversion of tenant-farmers into proprietor-farmers, without interfering either with legal right or social traditions. As the domestic establishments of the proprietor-farmer would be very much larger than those of the tenant-farmers, the country would be repeopled; and the only loss would be to the West End of London, where so much of the wealth and energy of the highest class of Scotchmen is now annually wasted.

I have said nothing, as yet, of the political aspects of this question, but what I have to say will be said in a very few words. Whatever strengthens the social position of the landed interest will strengthen its political position also, because political influences are only social influences acting in a wider sphere. And this is specially true of political influences in the forms in which they must act in this country now, and, more or less, have acted in this and all the other countries of Europe since the French Revolution. That prodigious upheaval obliterated all political class distinctions and established a fictitious political equality which never corresponded, or could correspond, with the social facts of any community whatever. The consequence has been that social influences have now to assert themselves politically without the help of any political organization at all. All direct recognition of the organic structure of society being denied politically, social influences, whether of classes or of individuals, which rise above the lowest stratum of political life, must simply "make themselves felt," as it is said, indirectly. Now the extent to which the landed interest will make itself felt will depend mainly on two conditions—the number of its representatives and their personal presence in the localities in which their influence must act. The importance of the subdivision of estates and of the personal residence of proprietors for political purposes thus become apparent. Neighbouring proprietors, too, more especially if they are brothers and cousins, stick closer together than landlords and tenants, and hence the political importance of the substitution of proprietorship for tenancy, and the value of the maintenance of the *gens*. Where men are bound to each other by the ties of kindred, neighbourhood, and common interest, the absence of political sympathy will always be rare; and a united family will seldom fail to act as a political momentum in the district in which it is located, to an extent which is impossible to any single member of it, even when he chances, by a happy accident, to be its most gifted man.

QUALIFIED ADMISSIONS.

THE class of cases bearing upon the effect of qualified admissions is interesting, and, to quote the opinion of Lord President Inglis, one of great practical importance. There is evidence from the decisions that this subject has been involved in confusion. Somehow or other the mysteries of extrinsic and intrinsic qualifications have got mixed up with it, and a doctrine of law which is in itself clear, and recommends itself to common sense, has consequently been rendered somewhat obscure. It seems to be now established beyond all doubt that no pursuer can found upon the admission of a defender and reject the qualification attached to it. Thus if A has lent money to B, and B admits the fact but adds that he has repaid it, A cannot succeed in an action upon the strength of any such admission alone, but must first disprove the qualification. B is not called upon to lead proof. This seems clear enough, and yet but a few years ago in a case of this sort the judge threw the burden of *proving* the qualification upon the defender, and limited the proof to writ or oath—a decision very properly reversed upon appeal.

The oldest authority would appear to be the case of *Campbell* (November 28, 1778, M. 9630), but in the case of *Anderson* v. *Rintoul* (February 3, 1825, 3 Shaw, 496) we find evidence of the law being somewhat unsettled upon this point. That was a family dispute arising out of a claim for legitim at the instance of a daughter's husband. It was maintained in defence that certain payments had been made to him by his deceased father-in-law in full of his wife's patrimony. The pursuer admitted these payments, but explained that they were due in respect of a claim by his wife as her mother's executor. The defenders craved to be allowed to lead evidence for the purpose of disproving this explanation, but the Lord Ordinary refused to take such evidence, and repelled the defences "in respect there is no evidence of £200 having been paid to the pursuer but his own admission, qualified by an explanation that the money was paid to him on a different account." Lord Glenlee, while he concurred with an observation of the Lord Ordinary as to the impropriety of separating the admission of a party, taking one part, and rejecting the other, observed that "a statement in defence could not preclude the opposite party from adducing further evidence as an oath on reference would have done." And Lord Pitmilly said, "The whole admission must be taken as it stands. . . . While, however, the admission is evidence so far as it goes, it does not exclude other evidence to be considered along with it in giving judgment." In actions for the recovery of debts a variety of qualifications may accompany the admission that money has been received or that a liability once existed. In the case of *Gray* v. *Munro* (December 10, 1829, 8 Shaw, 221) the

defence was that the sum sued for (the price of some sheep) had been already paid. Both parties relied upon books, but as they neither proved the constitution nor payment of the debt, the case came to depend upon the qualified admission of the defender. The pursuer contended, quoting Erskine, 4, 2, 11, that the qualification was extrinsic, the debt being of a nature which fell to be discharged by written receipt, but the Court were careful to distinguish between such admissions and a reference to oath. Lord Pitmilly said, "When a pursuer refers to the defender's oath, he only refers to what he is bound to prove, and if the defender goes into something that he (the defender) is bound to prove, that is extrinsic. . . . But this doctrine does not apply to voluntary admissions. We must take the whole together, giving such effect on the whole as we may think it entitled to. We may perhaps lay more weight on one part than another; but we must take the whole of it together, and not at all in the way we would do as to an oath on reference."

A similar decision was given in the case of *Grierson* v. *Thomson* (January 14, 1830, 8 Shaw, 317). On the other hand, the case of *Sibbald* v. *Fraser* (February 17, 1837, 15 Shaw, 591) seems inconsistent with the above decisions. There the plea was compensation. It was an action for money lent, admitted to have been received by the defender, who, however, pleaded as a set-off a claim due by the pursuer to him for board during a certain number of weeks. The pursuer on his part met this with an admission of having resided with the defender for a short period. The Court only allowed the defender by way of compensation the sum equivalent to the period admitted by the pursuer. It is however possible (although the report does not state it) that the pursuer had evidence of the loan independent of his opponent's admission, in which case the inconsistency disappears. In the same volume of Shaw's Reports, however, there is a decision of Lord Jeffrey's, affirmed by the Inner House, which it is impossible to reconcile with the other judgments upon this point. The case is that of *Murray* v. *Elliot* (June 14, 1837, p. 1141), and the rubric bears that "in an action for payment of the balance of a debt originally constituted by bill which had been delivered up, the debtor having judicially admitted circumstances sufficient to establish that the balance had not been paid:—*Held*, that such admission could not be effectually qualified by the statement of counter-claims of which no other evidence was produced." Lord Jeffrey seems to have dealt with such admissions as a judge is bound to do with a prisoner's declaration—to accept them when against the party making them, and reject them when in his favour. He says, "In judicial statements where nothing but adverse interests are in view, such qualifications are entitled to no regard whatever, except in so far as they can be proved by other evidence. The rule as to judicial declarations is familiar, and the case is perhaps stronger as to statements put voluntarily on the record. To take a plain

instance. If a party admit on an oath of reference that he borrowed a sum of money from the pursuer, but adds that he afterwards paid it, this is undoubtedly *intrinsic*, and would entirely take off the effect of the admission. But if a party make the same statement, of his own accord, on a record, there can be no doubt that his admission of the borrowing will be conclusive against him, and that the allegation of repayment will be quite disregarded till it is proved by proper evidence." Thus Lord Jeffrey quite shifts the burden of proof. It is difficult to see how (apart from any specialities of the case, which do not appear) he could lay down such general principles without at least seeking to reconcile them with the decisions of *Anderson* v. *Rintoul* and *Gray* v. *Munro*. He goes on to say that the case was even stronger against the defender, because the quality adjected to his admission was not payment but a plea of compensation. It would appear that at this period the Court inclined to a different view upon this subject than that which had previously prevailed. There is, however, now no doubt that the plea of compensation forms a qualification of an admission which must be disproved by the party founding upon the admission. Such was the plea in the case of *Milne* v. *Donaldson* (June 10, 1852, 14 D. 849). The Lord Ordinary in that case was Lord Wood, a judge who in a previous case, that of *Campbell* v. *M'Cartney* (June 23, 1843, 14 D. 1086), had evidently possessed some doubts as to the distinction between qualified admissions and oaths on reference; for he says in deciding the earlier case, that had it not been for the authorities cited "he might have entertained some doubt whether any substantial distinction could be drawn in favour of the party making admissions—between judicial admissions coupled with qualifications in such a case as the present, and admissions with qualifications on an oath upon a reference when the claim was prescribed." But in *Milne* v. *Donaldson* he entertains no difficulty, and he goes the length of suggesting the ground for such a distinction. "One reason," he says, "of the distinction seems to be, that in the case of a reference to oath no contrary or rebutting proof is allowed to the opposite party, whereas in the case of qualified admission the qualification may be rebutted by contrary proof. In the first rebutting evidence of an adjected qualification not being competent, the admission may be separated from everything which accompanies it that is not clearly an intrinsic quality, and may be founded on *per se* against the party admitting; while in the last rebutting evidence of an adjected qualification being competent, things not amounting in law to what in an oath would form an intrinsic quality must be taken as qualifying the admission, and available to the party admitting against the party founding on the admission." Some unwillingness to discuss the point was exhibited in the Inner House. Thus the Lord President said, "I do not go into the question whether this would be a relevant statement in an oath of reference;" and Lord Cuninghame observed, "It

may be different when there is a reference to oath, and a qualification held extrinsic in law occurs in the deposition of a party." Perhaps the simplest explanation of the principle that such a judicial admission is to be treated as a whole is given by Lord Ivory, when he reminds us that a statement of this sort is not an admission but really a denial of the debt.

This question of the effect of a qualified admission has arisen again and again under a variety of circumstances. In the case of *Dowdy* v. *Graham* (December 8, 1859, 22 D. 181) a demand for money alleged to have been lent met with this answer, "Whatsoever I got I received as a present with a hearty welcome as a gift." The Sheriff who decided this case in the first instance, by a series of findings came to the conclusion that the defender must pay. He reasoned in this way: The defender acknowledges a gift, but *donatio non presumitur;* it can only be proved by writ or oath of the alleged donor, the defender offers no such proof, therefore she must be decerned against. How different the view taken in the Court of Session was may be seen from the opinion of Lord Curriehill, who said, "This is a very clear case. A loan of cash can only be proved by writ or oath. There is here no reference to oath, and the only writ adduced, as I read it, denies the debt; and I do not inquire further, because if anything is settled in our law, it is that a writing which is founded upon as evidence must be taken with all its qualifications." Lord Deas thought this case equally clear, but added, "I do not wish to give any opinion that there may not be questions of intrinsic and extrinsic in writings."

The most recent cases are *Picken* v. *Arundale & Co.* (July 19, 1872, 10 M. 987) and *Gelstons* v. *Christie* (July 20, 1875, 2 R. 982). *Picken's* case was an action for the balance upon a debit and credit account. The defender admitted all the items in the account, but brought out a much smaller balance by giving credit to himself for goods not admitted by the pursuer. Both parties renounced probation. The Sheriff simply disallowed the items claimed on both sides, which in his opinion required to be proved, and gave decree against the defender for the balance which remained after doing this. But the Court of Session held the case to be one coming under the rule applicable to qualified admissions as established by *Milne* v. *Donaldson.* Lord Deas however dissented, although his ground for doing so does not clearly appear in the report of his judgment. While agreeing that "when both parties produce accounts, the pursuer is not entitled to take the defender's account as an admission of articles claimed in his account without taking the account as a whole," he said, "I am of opinion, at the same time, that the defender in such an action may so state his defence as to reduce the question between him and the pursuer to certain specified points." And he was of opinion that the question had been so limited in this particular case. While he quite admitted the rule about admissions being taken with their qualifications, he

thought the case of *Milne* went far enough—perhaps too far. Lord Deas himself delivered the judgment of the Court in the case of *Gelstons*. The pursuers here sought to recover the amount of certain accounts collected by the defender as their agent. The defender produced an account current in which he credited himself with a considerable sum for time and labour spent in promoting the agency which he alleged had been improperly taken from him, and also with the salary of a traveller employed. The pursuers contended that these two items could not be looked at in the present action, and declared their willingness to accept in full of their claim the balance which was brought out by the defender himself after setting them aside. The Lord Ordinary decided in favour of the pursuers, but the Inner House held that if they refused to accept these items they must reject both sides of the account and prove their case in the ordinary way. Lord Deas said, "Now the question is whether, by giving in that account, the defender is to be held to have admitted the debt sued for. I do not think that he is. I do not see how the production of that account current can be held to be an admission of the debtor's liability for the sum sued for. It may very well be that the Lord Ordinary has arrived at an equitable result; but looking at the current of decisions, I do not think the defender can be held to have admitted the debt. The pursuers are not obliged to accept the admission with its qualifications, but failing their doing so, there is nothing to absolve them from the burden of proving their debt in the ordinary way. I think they must just do so."

The question may be asked, Does the principle laid down in this case not apply to a vast number which in practice are never brought within it? We refer to cases in which unliquidated claims are pleaded along with an admission of the liquid claim sued for. It is true that the one cannot stand against the other, but are you entitled to have decree upon the strength of the admission while you ignore the qualification? Take an instance of daily occurrence in the Small Debt Courts, an action for rent, and the debt admitted but accompanied by a claim for damages. Decree goes forth as a matter of course; but is the claim after all in a different position from that advanced by the defender in *Gelstons'* case, which was really one of damages and not an item the amount of which could be at once ascertained in an accounting? The rule that an admission cannot be separated from its qualifications has certainly been made to apply very generally.

In a note to Dickson's Evidence (p. 883) several cases are referred to as bearing out the statement in the text, that "if the qualifying statement is incredible or improbable in the circumstances, the Court may disregard it." Looking, however, to the period at which the cases were decided, it is possible that they illustrate the fact that at that time the present doctrine was not so clearly recognised. One of them is the case of *Sibbald* already

referred to. In *The Magistrates of Nairn* v. *Mackintosh* (Feb. 2, 1830, 8 Shaw, 432) the holder of a disposition of heritable subjects, the narrative of which contained the acknowledgment of a certain price having been paid, admitted that he had not paid the full amount, but explained that he had afterwards settled for the balance. The onus of proof seems to have been thrown upon him because of the contradictory averments in his pleadings. This may in the circumstances have been quite right, but the contention of the pursuers that his mere admission threw on him the burden of proving that he had subsequently paid the balance was certainly unsound.

In conclusion, we may mention the case of *Bilsborough* v. *Bosomworth* (December 5, 1861, 24 D. 109), by which this rule of qualified admissions is extended to the case of an admission accompanied by a condition, as when a defender says, "I will pay a certain balance if you admit the correctness of our accounts, and that they contain all the unsettled transactions between us." The pursuer in such a case cannot demand interim decree for the admitted balance without accepting the conditions.

ELEVENTH REPORT OF THE JUDICIAL STATISTICS OF SCOTLAND FOR THE YEAR 1878.

We have been in the practice of summarizing this annual blue-book of dry figures of judicial procedure. We fear few people have the courage of wading through these ponderous and forbidding tables, and therefore we have deemed it proper to give a synopsis of such facts as are worth knowing. Much matter collected at great trouble and expense appears of little or no importance.

The Report commences with what is designated "Adjustment Table," which is neither more nor less than *errata* of last year's report. In three instances the persons misnamed "returning officers" made erroneous reports which they now correct. These errors throw no small doubt over the whole reports and should be carefully avoided.

The first table is titled "Police," and gives for counties and burghs, for three years—(1) establishments; (2) the effective state of forces; and (3) the expenses. In 1876 the establishments (meaning the numbers) were, in counties, 1235, and in burghs 2121, increased in 1878, in the former to 1306, in the latter to 2334. The different classes of the forces are detailed. But some explanation should be given of the number of 158 in the force as being "*not authorized.*" The important fact is mentioned that the expense of police in counties in 1878 was £118,220, and in burghs £182,390, or for both £300,611, whereof from the national Exchequer there has been paid so far in relief £123,343.

A second table gives a comparative table of the "number of persons charged and *disposed* of (?) by the police for five years," ending 1878. This table must have cost much trouble in compiling, and many of its details are of little importance. The number of persons "apprehended or cited" shows a gradual but not a great increase during the quinquennial period. In 1878 the number in both counties and burghs was 139,114. It is flattering to the police authorities to learn that of 119,607 persons tried "*at the instance of the police*" (?), 112,313 were convicted, and only 7294 acquitted. But it requires some explanation why in the cases of 19,957 persons it should be reported that the "*proceedings dropped*" on the average of the quinquennial period.

A third table gives the county returns of police establishments and effective state of force on 31st December 1878. A fourth table gives the expense of the establishments. A fifth and sixth gives the same returns for burghs. It may be remarked that, looking at the population of some burghs and the number of the force, there appears to be more economy in some of these civic centres than in others. Thus we find in Edinburgh, with a population set down at 196,979, a police force of 412, at an expense of £33,777. Glasgow is set down with a population of 447,156, and a force amounting to 918, at an expense of £80,464. Aberdeen is stated as having a population of 88,108, with a police force of 95, and at the cost of £6955. Other tables give minute returns of persons charged, offences, results of prosecution, charges *taken* (?), numbers committed for trial, *disposal* (?) of persons committed, sentences, ages and sex, courts of trial, aggravations, number of weeks elapsing between committal and trial. All these details are given separately for counties and burghs. Not content with this plethora of statistics, the public are further treated to tables showing decennial comparison of the number of criminal offenders *disposed of* (?) for the ten years ending in 1878. No less than thirty-five folio pages are devoted to police statistics, and much of these laborious and expensive details, we doubt much, will ever be scanned by the most rabid statistician or be made subservient to any practical use.

The police section appropriately is followed by "*prisons and prisoners*." Since the 1st April 1877 the prisons have fallen under the control of Government. Four Commissioners have certain duties in Edinburgh, and one of three Government inspectors makes monthly visits to the various prisons. The counties and burghs have prison visitors, but apart from their periodical visitations they have little or no power. The localities are freed from direct assessment as heretofore, but it is to be yet seen whether the cost will be lessened or the management improved. A great number and variety of tables are given under this section of the Report. The first in order gives the average daily number of criminal and civil prisoners from 1840 to 1878. In the former year the daily average of criminals was 1940, of debtors 108, and in the latter

year the criminals had risen to 3112, and the debtors had fallen to 83. Since 1841 the daily average of criminal prisoners has been between 2000 and 3000. The highest number was in the year 1849, when the number reported was 3143, and in 1878 it was 3112. One of the tables gives a comparative table of the expenditure for prisons in Scotland for five years ending in 1878, and the average annual cost for each prisoner. From this table we are informed that the annual average cost of a prisoner in the General Prison is £26, 16s. 11d., but in the county prisons £22, 16s. 6d.; whilst in the former the yearly average net profit from labour gives £4, 6s. 2d., and in the latter £2, 2s. 4d., reducing the annual cost for each prisoner in the General Prison to £22, 10s. 9d., and in the county prisons to £20, 14s. 2d. Besides the General Prison at Perth there are fifty-six county or burgh prisons, and eight police cells for imprisonment not exceeding three days. Under this department there are numerous tables extending to such extreme minutiæ as to the conduct of the prisoners, prison punishments, health, sickness, and death, instruction not only in the famous R's, but in having "learned a trade." Then follows copious statistics as to civil prisoners. It appears that during the year 1878 no fewer than 420 debtors were incarcerated for sums less than £20, and eighteen for sums above £500, and five for sums above £1000. There was one escape, but he was recaptured, and three suicides in that year.

We gladly depart from police and prisons to the more congenial department of "*business in the Courts of civil jurisdiction.*"

This section commences with the *Court of Session.* The first table is titled "Comparative Table of the Business in the Outer House of the Court of Session in the years 1874, 1875, and 1876, *so far as returned by the Clerks of Court*, also for the years 1877 and 1878." From the distinction thus taken, we are led to believe that the clerks in the two last-named years had behaved better than in the previous years. The notes however are still left placing certain clerks in the pillory as either making no returns or such as are "*defective and not suitable for publication.*" The following are the results for each year:—

	1874.	1875.	1876.	1877.	1878.
The total of cases before the Court .	1529	1549	1795	2363	2442
Final judgments within the year . .	785	825	835	1120	1174
For pursuer or *other promoter* (?) . .	586	597	572	818	921
For defender or respondent . . .	167	202	218	270	229
Mixed judgments	32	26	45	32	24
With costs for pursuer	412	483	452	634	732
With costs for defender	97	126	119	152	132
Without costs for pursuer . . .	154	111	115	167	159
Without costs for defender . . .	67	72	89	76	73
Costs from common fund . . .	7	11	12	21	11
Costs otherwise disposed of (?) . .	48	22	48	70	67
Verdicts of jury	10	6	14	13	8
For pursuer	6	2	12	6	7
For defender	4	4	1	4	1
Mixed verdicts	...	...	1	3	...

The above abstract gives all that is essential. Whether the process commenced by summons or petition or by writ is of no earthly importance, neither is it obvious how cases "*transferred from one Lord Ordinary to another*" can first add to the number of cases brought within the year, and then with different figures appear as deductions from the gross total. It is worthy of remark how the pursuers prevail in the suits, and how costs almost invariably follow. Trial by jury appears to be greatly in disfavour in the Outer House. There have been only fifty-one verdicts in the five years, and only eight for the last year.

The second table under this section gives the business of the Inner House for the five years ending in 1878. The following are the results for each of the five years:—

	1874.	1875.	1876.	1877.	1878.
Number of cases within the year	878	898	866	1024	1242
Final judgments	558	493	479	580	586
Judgments for pursuer or other promoter (?)	348	284	290	326	341
For defender or respondent	179	184	164	220	191
Mixed judgments	31	25	25	34	54
With costs for pursuer	122	144	130	152	170
With costs for defender	154	136	126	169	149
Without costs for pursuer	216	131	155	162	157
Without costs for defender	26	44	37	44	45
Costs from common fund	20	19	12	22	28
Costs otherwise disposed of (?)	20	19	19	31	37
Trials by jury—verdicts	17	13	6	17	12
For pursuers	12	11	4	9	9
For defenders	4	2	2	8	3
Mixed verdicts	1	...	...	...	...
Judgments on review of Outer House—					
Adhered to	118	123	118	143	128
Repeated (?), but on different grounds	8	2	12	8	7
Reversed	33	39	27	40	43
Partially affirmed and partially reversed	16	17	9	18	16

Here again it is not easy to perceive how cases transferred from one Division to another can either add or subtract from the gross number. The transferences appear both as a credit and a debit. Neither is it of any consequence whether the causes have been brought into the Inner House by reclaiming note or by petition, or by "*appeal or other writ.*" There is sometimes a singular similarity, and at other times as great a diversity, in the results of the same class in various years.

The third table details the proceedings in the Court of each Lord Ordinary for the year 1878. This table is somewhat mystical. The Lord Ordinaries are only denoted by the office marks. The first is designated cases initiated prior to and in dependence at commencement of the year, and remaining in same Court. It gives 828 causes in dependence in these tribunals. The "oldest inhabitant" was judicially born so far back as 20th May 1830. The next survivor dates from 1845, and a few other lingerers fill up the series. Under 1876 there appears marshalled 188, and in

1877, 538, all "ganging pleas" at the commencement of 1878. The next table is a statistical curiosity. It is entitled "Causes transferred from one Court to another." It is nicely marked with the necessary niches and titles, but the whole is one grand chasm. Surely the single word "*none*" might have sufficed. The next table gives the causes initiated within the year. The number is 1618. The number of judgments within the year was 1174. The number of causes "*taken out of Court otherwise than by final judgment*" was 447.

Then follow numerous tables of varied characters, but only giving the results already stated, and dividing them amongst the various offices, but of no practical use, though it must have been attended with much labour and cost. Another table (VIII.) is finely squared off for figures, but iconoclastically is left one whole desolate blank!! One remarkable tell-tale is inscribed, "*the number of weeks lapsing between closing record and pronouncing judgment.*" This table is not easily to be understood. The sum of 445 as the aggregate of the number is not apparent. Though it appears that the greatest number of the causes were judged in little time, no less than 23 cases were beyond 50 and under 100 weeks in gestation, and 6 beyond 100 and under 150 weeks in the same process, whilst one unfortunate cause is said to have been above 200 weeks in transit, being about four years in reaching maturity. A separate table gives the results of petitions before the Junior Lord Ordinary; but here again most of the columns are blank, with the exception of the year 1877. This is followed by other tables of the most minute description, and might even be classified as "Statistics run mad."

One redeeming table stands out prominently amidst the barren wilderness as an "oasis in the desert," as the final judgments within the year. Here is given in detail the judgments pronounced by the Lord Ordinaries, and the results when being reviewed by the Inner House.

The following are the results of the judgments of the Lord Ordinaries when reviewed by the Inner House:—

	Affirmed.	Affirmed on different grounds.	Reversed.	Partially affirmed and partially reversed.	Total.
Lord Ormidale	1	...	...	...	1
Lord Shand	...	...	1	1	2
Lord Young	19	4	9	2	34
Lord Craighill	23	3	6	1	33
Lord Curriehill	25	...	7	2	34
Lord Rutherfurd Clark .	32	...	10	5	47
Lord Adam	28	...	10	5	43
					194

Lord Gifford is favoured with the same series of cells, but which

remains unfilled. Three other tables stare the public with vacant gaze, no figures being found in their caverns.

The next in order is a comparative table of the business in the *Sheriff Ordinary Courts* for the five years ending in 1878.

	1874.	1875.	1876.	1877.	1878.
The number of cases initiated within the year, and in dependence at its commencement	9128	9928	9454	9723	10,234
Final judgments within the year—					
In foro	2123	2710	2886	3272	3,479
In absence	3378	3536	3272	3837	4,280
Judgments by Sheriff	19	26	47	34	46
Judgments by Sheriff *on appeal*	715	985	1041	1249	1,135
By Sheriff-Substitute	1389	1699	1798	1989	2,248
Result of appeals—					
1. Sustained (meaning affirmed)	537	740	774	937	919
2. Reversed	108	128	162	179	162
3. Mixed judgments	70	117	105	133	104
Cessio Bonorums	168	191	212	307	442
Miscellaneous and administrative business (almost wholly performed by the resident Sheriff)	12,547	13,845	14,073	15,792	17,561

In this table there is the distinction between cases having been brought into Court by summons or petition, which is never of any earthly use. Now since recent legislation has abolished the summons as the initiatory writ, the year 1878 has a total blank under that title. The *cumulo* sum of costs are given, but no division has been made, as in the Court of Session, of costs given to the pursuer or defender, but an entry is made where costs are refused to both parties. There are the unmeaning entries "*where costs are not taxed or otherwise fixed,*" and where "*amount of costs entered in process.*"

A second table under this department details the number of cases initiated prior to and in dependence at the commencement of the year 1878. The total number was 1500, of which Glasgow claims the greater number, being 510. Fort William, Leith, Lochmady, Peebles, Dunblane, Stornoway, had only one each remaining on the roll at the close of the year 1877. The oldest plea dates from 12th May 1868, and stands to the debit of Inverary. A third table records the causes initiated *within* the year 1878. The total number was 8734, of which to Glasgow is allotted the greatest portion, or 2119. The lowest number is five, put down to Cromarty. Another table assigns to Sheriff-Substitutes 3479 judgments *in foro* within the year, and by the Sheriff Principal on appeal 1185, and otherwise 46. An accusing table is entitled "*Time occupied* [?] *by judgments of Sheriff-Substitutes on cases ended within the year.*" This is explained by "number of weeks, *first,* between date of Sheriff-Substitute's *possession* [?] of *completed* [?] process, and *second,* date of judgment. This is followed by a column sheet for fifty-seven weeks, though some of these enclosures have not a tenant. Only one unfortunate case is to be found with so lengthy a career, and is claimed by Glasgow. Two cases are placed over against

Dumfries as having thirty weeks' incubation. It is to the credit of the Substitutes that 2996 cases are reported as being polished off in one week or under. The same tell-tale table is applied to the Sheriffs, but forty-four weeks are the longest periods allotted to them, and only one case appears under this final column, placed to the debit of Banff. To the credit of the Sheriffs their work seems to have been perfected in no less than 856 cases in "*one week and under.*" There is an interesting table under the head of Bankruptcy, Poor Law, Lunacy, Registration of Births and Marriages, the Education Act, Sheriff-Officers, and the great variety of "miscellaneous procedure." A table under the head of Cessiones terminates this section, showing 442 cases within the year. Glasgow claims the greater share, being 146, whilst Edinburgh has only 36, but Hamilton has 32. Should any one have the courage to face this magazine of statistics bristling with figures, no small difficulty will be found in reconciling one table with another.

The next table in succession is a companion table of the business in the Sheriffs' Debts Recovery Courts for the years 1874-1878 inclusive. This is an amphibious tribunal partly conducted according to the rules of Small Debt procedure and partly on the line of the ordinary Court. It is most anomalous. It is not easy to know precisely the class of cases which fall under this jurisdiction, or why there ought to have been any classification or limit if the mode of adjudication was wise and proper. It is unjust in the principle of costs, the client and the agent being made to pay for brief conducted cases a sum to compensate for more extended litigation. The sooner this nondescript section of the Court is abolished the better. An extension of the Small Debt jurisdiction might be a judicious measure towards the abolition of this Court. The total cases brought in this form of action in the year 1878 was 6744. The sums claimed were in all £106,184. The costs awarded were £4800. The appeals to the Sheriff were 242, whereof 162 were affirmances, 55 reversals, and 6 withdrawn. There were four appeals to the Court of Session, being the average of the five years. Here again there is a painful subdivision of details of no apparent utility, such as decrees *allowing* the full claim, the partial claim or *otherwise* (?), or decrees *disallowing* the whole claim or *disallowing* a part. The total fees received are set down for 1878 at £1218. Glasgow had 1925 of the number of cases; Edinburgh, 621; Dundee, 379; Hamilton, 339; Paisley, 361; Greenock, 217. Eight folio sheets follow, giving minute details, the only recommendation of which is to show how great pains and costs can be expended in statistics of little value or interest.

The next table applies to the Sheriffs' Small Debt jurisdiction for the same quinquennial period. In 1874 the total number of cases was 44,529, the total of sums claimed £149,951. The amount of costs awarded was £8794, and the total fees received £5802.

These amounts gradually increase in successive years until in 1878 the total number of cases was 57,336, and the sums claimed £205,988. The costs were £12,657, and the fees received £7589. There follows the painfully minute analysis of the cases. Glasgow claims 20,481 of the cases. Several of the Small Debt Circuits appear with cases less than ten in number, and now that transit is so swift and cheap, many Circuits may be well dropped out of the list.

Another table affords similar details of the Justice of Peace Small Debt Courts during the five years ending in 1878. In 1874 the total number of cases was 13,620; total claimed, £23,785; costs awarded, £1696; fees received, £1260. Every successive year shows an increase. In the year 1878 the number of claims was 15,717; the amount claimed, £28,533; costs awarded, £1944; and fees received, £1456. This increase is the most remarkable, since it appears that it is only in some counties that Justice of Peace Courts are held. The counties of Aberdeen, Argyle, Inverness, and Perth, whose extensive boundaries would appear most to require local Courts, yet present a blank in the columns attached to their names. Opposite to other Courts there appear seven with fewer cases than seven, and two with only a unit. There follow other tables with columns mostly blank in details. It appears that in only 45 decrees poinding and sales were executed.

An important quinquennial table is given in bankruptcy. The period here, however, is only from 1873 to 1877 inclusive. In the former year the number of *bankruptcies* (meaning sequestrations "*awarded*") was 2895, increasing every successive year until in 1877 there number was 3343. Much really vital matter appears in this table. The following is the average "length of time between the awarding and discharge of bankruptcies [sequestrations] wound up by final division:"—

6 months and under 1 year	15
1 year and under 18 months	41
18 months and under 2 years	42
2 years and under 3 years	50
3 years and under 4 years	30
4 years and under 5 years	20
5 years and upwards	49

The gross estates under sequestration averaged for the five years £607,436. Under the head expenses it appears that the average allowance to bankrupts was £1009, the trustees' commission, £20,174; law expenses, £26,697; ordinary expenses, £34,903; extraordinary expenses, £34,903; making the total average of expenses £92,918. The average of total dividends was £402,611. The average of no dividend was 28, not exceeding 1s. 33, and at 20s. 5 in number. This last table is well worth the attention and study of the mercantile community, and amply repays the great pains which has been taken in its collection and preparation. It appears that by far the greater number of sequestrations are now awarded

in Sheriff Courts. There is also a valuable table as to judicial factories, and another as to judicial records kept at Edinburgh, with the total fees under each department, and many other minute details. It would appear that 45 certificates have been issued under the Act 31 and 32 Vict. c. 54, of "English and Irish Judgments," of which 43 were of English and 2 of Irish Courts.

As a whole these annual reports confer much credit on Mr. Donaldson, under whose able superintendence they are compiled; but, as we observed on previous occasions, we submit that they would still be more useful were they much circumscribed, and, after the pattern of the Bankruptcy Statistics, confined to the prominent facts which test the beneficial working of the Courts. Much of the details, whilst imposing great labour and expense on the clerks of the Courts, can be of no earthly utility to the most rabid statist, and we fear that few ever scan their minutiæ even to the extent we have for some years painfully done.

H. B.

STATUTES AFFECTING SCOTLAND.

EXCITING events abroad and steady unwearied obstruction at home have not conduced to swell the Statute-Book for the present year. As regards Scotland in particular the session has been far from important. According to our usual practice we proceed to note the statutes affecting this country.

By chapter 9 the true meaning of section 30 of the Friendly Societies Act of 1875 is declared. As now explained, that section applies "only to such friendly societies, whether registered or unregistered, and industrial assurance companies as receive contributions by means of collectors at a greater distance than ten miles from the registered office or principal place of business of the society or company." "The Act to amend the Law of Evidence with respect to Bankers' Books" (c. 11) repeals the Act of 1876 (39 and 40 Vict. c. 48). A copy of any entry in a banker's book may be received as evidence, if it be proved by an officer of the bank that the book from which it was taken was one of the ordinary books of the bank and the entry made in the ordinary course of business, and also if the correctness of the copy is sworn to by some one who has examined it with the original. Parties to legal proceedings may obtain a judicial order for liberty to inspect and copy entries in the books of banks. Such order may be given by the "Court or Judge." "Judge" is defined to mean a Lord Ordinary of the Outer House, and also the judge of a county court when the action is before him. Whether this includes Sheriffs or not may be doubted, but it is of little importance, seeing that the Court has almost equal power with the Judge, and the interpretation of

"Court" is wide enough to embrace every legal tribunal. The only distinction between the Judge and the Court seems to be that the former alone can compel a banker to produce the original books and appear as a witness in special cases.

"The Act to amend the Public Health (Scotland) Act of 1867" (c. 15) is short but important. It gives power to the local authority upon requisition of the inhabitants to alter or combine special drainage and water-supply districts. The decision of the local authority may be appealed in the manner provided for by the Act of 1867.

Few can doubt that the Habitual Drunkards Act, 1879 (c. 19), is calculated to do much good if taken advantage of. It is now possible for a person who is conscious of his own inability to withstand temptation to place himself beyond its reach. Once in the retreat provided by this Act, he is completely in the power of others; and if he violates the rules laid down for his guidance, or attempts an escape, he will be treated and punished as a criminal offender. But will this Act be taken advantage of? Very great care is taken of personal liberty, and every precaution to prevent the provisions of the statute being made use of for improper purposes. The habitual drunkard must make a written application in statutory form to the licensee of a retreat, stating the period during which he wishes to be confined. Two persons must sign a declaration to the effect that the applicant comes within the scope of the Act, and his signature must be attested by two justices of the peace, who must have satisfied themselves as to his habits, and explained to him the consequences of the step he is about to take. Provisions are made for the licensing of retreats, and for the appointment of inspectors to visit them. Any person detained in a retreat may, when requisite for his health, obtain a licence to remain outside it for a certain definite period, being under the charge of a respectable and trustworthy person named in the licence. The habitual drunkard who behaves improperly while an inmate of a retreat is liable to a fine of £5, or imprisonment for seven days; and if his misconduct occurs while he is residing outside the retreat under a licence, the licence is forfeited. We refer our readers to the criticism upon the statute contained in our last issue.

The conflicting decisions given by the Supreme Courts of England and Scotland under the Sale of Food and Drugs Act have rendered an amendment of that statute necessary. Our readers will bear in mind that by a decision of the Justiciary Court the Act was rendered useless for all practical purposes, as a sale to a public officer for the purpose of analysis was held not to be to his prejudice, and consequently not to warrant a prosecution. The English judges took the view which had for years prevailed in the inferior Courts of Scotland, and which rendered any amendment of the statute unnecessary. The new Act (c. 30) provides, by section 2, that "in any prosecution under the provisions of the

principal Act for selling to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, it shall be no defence to any such prosecution to allege that the purchaser having bought only for analysis was not prejudiced by any such sale. Neither shall it be a good defence to prove that the article of food or drug in question, though defective in nature, or in substance, or in quality, was not defective in all three respects." The latter portion of this section relates to the opinion of two of the Scottish judges, which was to the effect that the article sold in such cases must have been defective in every respect. We need say nothing further as to the statute, which will be found printed in our October number.

Next we notice an "Act to amend the Conveyancing and Land Transfer (Scotland) Act, 1874" (c. 40). By section 118 of the Bankruptcy Act of 1856 it is provided that a poinding of the ground (except when carried into effect by sale sixty days before sequestration) and a decree of maills and duties (except when a charge has been given sixty days before that date) shall only be available in a question with the trustee for the interest of the debt for the current half year, and arrears for one year immediately preceding. This was the law until the passing of the Conveyancing Act of 1874, which repealed that section and provided that "heritable creditors who have been in possession under their securities, and whose right to the rents collected by them has not been challenged by action previous to the commencement of this Act, shall be entitled to retain and apply all rents collected in the same manner as they might have done if the provisions of the section hereby repealed had not been enacted." The practical result of this new provision was to leave the rights of poinding creditors in such cases which had been affected by the bankruptcy statutes to be regulated by common law. In giving judgment in the case of the *Royal Bank* v. *Bain* (July 6, 1877, 4 R. 985) Lord Deas said, "It is of no relevancy to inquire why the Legislature may have chosen first to innovate on the old law of poinding of the ground by two successive statutes, and then by a third to restore the old law to its original position. It is a maxim that the Legislature can do no wrong, although it is admitted it may do things very odd. But I am not prepared to say that it is more odd to restore to heritable creditors by the Act of 1874 the same rights they had till recently immemorially enjoyed, than it was to have diminished the value of these immemorial rights to a minimum by the Acts of 1839 and 1856." What will his Lordship say now? By the 3rd section of the new statute the 118th section of the Bankruptcy Act, in so far as poindings are concerned, is restored. It comes into operation on the 1st day of December, but its effect is postponed in the case of heritable securities constituted prior to its commencement until December 1882. The "Act to amend the Acts relating to the

Valuation of Lands and Heritages in Scotland" (c. 42) is of no great practical importance. Appeals and complaints under these Acts are no longer to be heard by the general body of Commissioners of Supply, but by a standing committee consisting of not less than five or more than twenty members, with a quorum of three. One of the number is to be elected chairman. We question whether this will effect any good result? Practically such appeals are heard by a certain number of Commissioners. It is often difficult to beat up a quorum in some counties, and under this Act those qualified to sit will obviously be very considerably diminished. In large counties there may be more than one committee, each having a district attached. Under sections 7, 8, and 9 some new provisions are made regarding appeals to the Court of Session under the Valuation of Lands Acts.

Lastly we may mention the "Lord Clerk-Register (Scotland) Act" (c. 44). That office is to be in future purely an honorary one. Upon the resignation or death of the present Deputy Clerk-Register power is given to appoint a successor, who is to be an advocate of not less than ten years' standing, with a salary of £1200 per annum. This gentleman will also hold the office of Registrar-General of Births, Deaths, and Marriages in Scotland. The 12th section provides a retiring allowance for Mr. Pitt Dundas, whose service as the first organizer of the registration system of Scotland receives a special notice.

Such is a brief summary of the recent legislation affecting Scotland. It is a significant fact that nearly half of these Acts have been passed for the purpose of amending quite recent statutes.

CITY BANK APPEALS.

NO. III.

PROBABLY with the final decision in the case of *Muir*, and with the certain knowledge of the terrible position of liability in which trustees had been placed, the interest of the general public in the City of Glasgow Bank appeals may have somewhat languished; but in the decision of the other questions raised by the appeals subsequently argued and decided, there arose many points of interest to the legal profession, and of much value in fixing upon its true basis the law relating to companies situated as the City Bank was. We shall take the next case in the order in which we find it, and accordingly first offer a few remarks upon the judgment in *Bell and others* (*Lang's Trustees*) v. *The Liquidators*. The position of Bell himself was that of an original trustee of the truster, a Mr. Lang, who died many years ago, and he endeavoured to make out that there never had been a valid transfer of the stock to him. But there were facts against this contention too serious to be over-

looked. As long ago as 1851, Bell, by signed mandate, authorized payment of the dividends to the truster's widow; again there was a purchase of additional shares in the same year, with signature by him of the transfer and a new mandate as to dividends. In 1867 there were mandates signed by him authorizing transfer to the whole body of trustees, including new ones then assumed, and recognising the transfer. These circumstances the House of Lords deemed conclusive as to Bell, but there was also the liability of the assumed trustees to be disposed of. It was shown that they had been duly assumed with every formality, and that full authority had been given for the transfer to the newly assumed and original trustees of the stock, the stock ledger of the bank containing a note of the whole transaction. It is not surprising that the appeal in the case of these assumed trustees also failed, but the case was chiefly, we think, remarkable for the course adopted as to Janet Lang, one of the assumed trustees. This lady was not of age when assumed, nor had she attained majority at the subsequent meeting when it was agreed to transfer the stock. When the scrip of the transferred stock was produced to the trustees in 1872 she was major, but by that time married. Her husband was not a party to the action in the Court of Session nor a party in the appeal, and although the suit bore to be carried on by her "with the consent of her husband," yet the House of Lords ordered her name *in hoc statu* to be removed from the list of contributories, "without prejudice to the right of the official liquidators to place upon the list the names of her husband and herself in her right." We confess to feeling somewhat that this is rather the English way of looking at such a question than that to which in this country we are accustomed, and it seems suspiciously of the nature of technical refinement. Still it must be noted as an evidence of the strong views taken by the House of Lords as to the protective effect of marriage upon a woman's rights and liabilities, even though there came from Lord Penzance what was almost a protest against the doctrine enunciated by the Lord Chancellor.

Following upon *Bell's* case came that of *Alexander Mitchell*, who had adopted a somewhat original mode of endeavouring to escape liability; for after the bank stopped payment on October 2nd, and after the announcement on October 5th that on October 22nd a meeting for winding up would be held, Mr. Mitchell on 16th October resigned his office of trustee, and entered his resignation duly on the sederunt-book of the trust, the minute being also signed by all the other trustees and by the beneficiaries. The bank, however, declined to take any notice of the resignation, and the Court of Session refused a petition to remove the name from the register of shareholders. The Lord Chancellor (Cairns) in the course of his observations on the appeal said: "I should be very much disposed to hold that the power given to the directors to transfer shares—whether it were a power merely ministerial, or

a power attended with a right of investigation or option—was, as was said by my noble and learned friend Lord Selborne in *Allin's* case (L. R., 16 Eq. 449), a power intended to be in operation together with the other clauses of the deed of settlement, and while the company was carried on as a going concern for the purposes of a common agreement, and was not intended to be in operation for the purpose of enabling individuals to escape from liability when the company had ceased to be a going concern, and when the general clauses of the deed were no longer capable of being acted on."

His Lordship added that the circumstances of the present case obviated the necessity for laying down any general rule, for there was an express provision under the deed of copartnery requiring them, if at any time on balancing their books it was found that they had lost all their reserve fund and one-fourth of their capital, to call a special meeting of their shareholders and (unless a majority of two-thirds were in favour of its continuance) to dissolve the company. The position of matters as regards the directors and Mr. Mitchell was pointed out by the learned Lord in these words: "The directors had closed their doors and publicly announced the stoppage of the business on the 2nd of October. It would have been competent to any creditor at any time afterwards to have presented a petition to the Court for the winding up of the company—for which petition there were ample materials—and the presentation of the petition would, under the Act, have been the commencement of the winding up, after which no valid transfer of a share could have been made. It is impossible to doubt that what prevented an adverse application to wind up the company was the notice issued by the directors on the 5th of October, which in effect stated to the public that they would call the shareholders together on the 22nd for the purpose of winding up the company voluntarily, on the ground of its insolvency. There was involved in this notice an appeal to all persons interested to support the directors in the proposal for a voluntary liquidation in preference to a judicial liquidation."

The directors were in fact absolutely prohibited by the action they had taken from doing anything to facilitate transfers altering the nature of the constituency from which the creditors must look for payment of their claims, and not only that, but perhaps affecting more or less largely every other shareholder in the concern. The appellant pressed largely the point that there had been "delay" or "default" on the part of the board in not doing what he desired. In the first place, the mere intimation of the undoubted fact of his resignation as trustee to the board of directors did not operate a transfer; that required action on their part, and this action they were not able to take because of the stoppage. Lord Penzance pointed out a "wider and more substantial ground" for the rejection of the appeal: "The powers which the Court of Session and

your Lordships are asked to exercise are the statutory powers conferred by the 35th section of the Companies Act, 1862, by which it is provided that the Court may, 'if satisfied of the justice of the case, make an order for the rectification of the register' by deleting the name of the applicant. But can it be said that the Court of Session ought to have been 'satisfied of the justice of the case'? The bank had ceased to carry on its business upon the avowed ground of its hopeless insolvency before the appellant resigned the office of trustee or took any step to retire from the partnership. When he applied to the directors, therefore, to sanction his retirement from the partnership, he did so, not for the purpose of terminating his connection with the bank in future, and thereby exempting himself from its future obligations, for there could be none, the business being wholly suspended, but for the sole purpose of escaping his partnership liability for the past."

Of the various judges in the House of Lords, Lord Blackburn alone seems to have felt any hesitation as to the judgment to be pronounced, and his Lordship appears to have lamented two things—the want of authority upon the point, and the want of any specific reference to such a case either in the statute founded on or in the deed of copartnery of the bank itself. With the desire of any lawyer, and above all of any English lawyer, for precedents we must all feel sympathy, though perhaps many precedents of such a nature as this bank failure afforded would put us out of patience with precedents altogether; but we venture to think that even upon the Act itself and alone there was not much room for hesitation as to the duty of the directors in the circumstances. The view taken by Lord Blackburn is that authority sufficient existed for the directors to call the meeting, and that being so, there was implied authority to suspend the registration of transfers till the result of the meeting was known. Is it not a less involved view to take that the calling of the meeting in the circumstances, already notorious of itself, *prevented* the directors from carrying out any transfers, and threw back the date of such prohibition to the day on which the bank closed its doors? Surely they needed no implied authority to refuse to transfer, there being inherent inability to do so.

(*To be continued.*)

THE LAW AND LEGISLATION OF THE PAST YEAR.[1]

WHEN an "inferior judge" sits in solemn state in his court-room, and dispenses to a presumably awestricken yet admiring posse of

[1] A few Words on the Law and Legislation of the past Year. By Frederick Hallard, Advocate, one of the Sheriff-Substitutes of Midlothian and Haddington.

procurators an annual dose in the shape of a summary of what every lawyer knows, or ought to know, he presents a spectacle which may be regarded as perhaps not wholly unpleasing in its amiable and harmless intentions; but the conditions are entirely altered, and the subject becomes one worthy of anxious consideration, when the same "inferior judge" utilizes his bench as a rostrum, and thence with Titanic eloquence hurls his bolts of rhetoric against those whom cross-grained Fate first rewarded by success at the Bar, and subsequently raised to a judicial position—elevated, shall we say, a trifle above that of their stern and unrelenting critic. Mr. Sheriff-Substitute Hallard has presented himself to the public at different times in both of these interesting conditions; for some years past the attentive reader of the daily papers has received an annual benefit, if not a treat, in the shape of the learned gentleman's explanations to those who practise before him of what has been laid down as law in the preceding twelve months, and what he considered should have been laid down. The same audience (together with such of the public as read the report of the proceedings) have also reaped the inestimable advantage of knowing from the mentor's lips not merely what new Acts have taken a place from time to time in our Statute-Book, but how they have failed in this or that particular to fulfil certain conditions deemed by him essential. This was well enough, we have all of us smiled at it and pardoned it, we have even borne with sublime fortitude the rebukes and buffets of a general character freely given no less to Bench and Bar than to the profession at large; all of us no doubt are the better of correction from whatever quarter it may come, and indeed the legal brotherhood may be said to have kissed the rod.

Still, submissive as we may have been in the past to the dicta of Mr. Hallard, his pamphlet of this year is just rather too much. A highly jocose allusion to Bill Sykes, with a poetical quotation, and an old tale of the bells of Dover and King Charles II., appear to us far the most interesting portion of the *jeu d'esprit* before us. Of little more than twenty-two pages seventeen are occupied by a discourse upon the City of Glasgow Bank cases civil and criminal. Without exercising "Promethean," or even "Epimethean" wisdom, it is not difficult to see that as to the civil decisions upon the liability of trustees the learned Sheriff-Substitute went with the popular tide, and forgot at once law and logic in his impetuous career. "With all due deference," he says, "to those eminent lawyers among us to whom the final judgment would have been no surprise from the first, the doctrine itself was so foreign to the general mind of Scotland, professional and non-professional, as to make the process of assimilation difficult even after the decision in *Lumsden* v. *Buchanan* by the House of Lords in 1865." Our ignorance may be great, but we have never yet heard of any eminent lawyer to whom the final judgment came as a surprise. The

question was *res judicata*, and that was the whole matter; the surprise would have been caused had the House of Lords reversed the decision of 1865, and we entirely sympathize with Mr. Hallard's manifest leaning to such a result, but it is impossible in such an inquiry to estimate any considerations involving "the general mind of Scotland," and so forth.

To the criminal trial of the bank directors, and to the questions raised there as regards theft, bail, intention to defraud, and so forth, the critic devotes an important share of his attention. As regards the question of bail he gives in his own way a sort of narrative of the events, adding that the Court will not "interfere with the discretion of the Lord Advocate in refusing bail unless the prisoner avers against that high official a design other than the attainment of the ends of justice." But then Mr. Hallard, though ready enough to visit with his disapprobation any act or omission, slips past what we have always thought a very important feature in this question of bail—almost an argument, in fact, against Public Prosecutors. The device of conjuring up a charge of theft against a prisoner so as to render his offence not bailable, and then after keeping him in durance vile of deserting the charge at the last moment, was rather worthy, we think, of a sharp practitioner of moderate reputation than of the high officers of the Crown; but it is not upon them that the vials of Mr. Hallard's wrath are poured forth. All his energy is reserved for the Bench, and his attack must be characterized as, to put it in mildest language, highly improper. He delivered a philippic to a body of gentlemen intimately connected with the Supreme Court against one of the most eminent of Scottish judges; that philippic was based at the utmost upon a matter of opinion in which nearly every lawyer differs from him, and yet we are treated to a dictatorial harangue practically telling us what would have happened had Mr. Sheriff-Substitute Hallard graced the Bench of the High Court of Justiciary. This is not as it should be, and we must sincerely hope that when he thinks over his pamphlet, and considers the honourable and responsible position he occupies, Mr. Hallard may see that from him least of all should such an outburst have come, and that he may in future years either spare the public and the profession the pain of such an exhibition, or control his remarks within the limits of merely captious criticism or querulous complaint.

Correspondence.

ACCURACY IN ADJUDICATIONS.

(To the Editor of the Journal of Jurisprudence.)

SIR,—I am glad to observe that there is no difference between Sheriff Dove Wilson and myself as to the existing law with refer-

ence to jurisdiction in adjudications. We are agreed that with the doubtful exceptions of adjudication *contra hereditatem jacentem* and adjudication in implement, the law is that they must be brought in the Court of Session. These exceptions are really matter of theory rather than of practice, for the fact is that such adjudications are not now, whatever may have been at one time the case as to the former, brought in the Sheriff Court. Mr. Wilson in his letter to you remarks that his purpose in the passage of his "Sheriff Court Practice" where he treats this subject "simply was to advise practitioners in the present state of the law not to bring adjudications in the Sheriff Court." On one point I did not go so far as Mr. Wilson with reference to the exclusion of Sheriff Court jurisdiction. With regard to adjudication *contra hereditatem jacentem* I deemed it safer to say "adjudications *contra hereditatem jacentem* where the heir renounces *have been held* an exception to this rule" (viz. the rule of the exclusive jurisdiction of the Court of Session). For this opinion I cited the case of *Ker* v. *Primrose* (4th Jan. 1709; M. 46), and the authority of Mr. Bell in a passage of his Commentaries (iii. 13, 11; Shaw's ed. ii. p. 958) where he says, "The form of attaching the estate of a deceased debtor where the heir takes up the succession, or where he subjects himself to the proceedings authorized by 1540, c. 106, were known forms of apprizing in 1672; and when the Legislature substituted for apprizings adjudications before the Court of Session, these cases were included in the law. But there was a third kind of diligence, that of adjudication *contra hereditatem jacentem*, which never appeared in the form of apprizing, which was always competent before the Sheriff. When the Legislature declared the Court of Session the only competent judicatory for these substituted adjudications, it did not mean (at least it has been so decided) to include adjudications *contra hereditatem jacentem*, and they are still competent before the Sheriff." Although the practice of bringing this species of adjudication before the Sheriff has ceased, I do not think until the case of *Ker* v. *Primrose* has been overruled that it can be stated as settled law that it cannot be used in the Sheriff Court.

But for all that I daresay Mr. Wilson's advice to practitioners not to bring adjudications even of this kind (for he gives that advice with reference to adjudications generally) is good advice.

But while there is no practical question at issue between us, there is an historical question of some interest on which we are or were not entirely at one, viz. whether "all adjudications in use were at one time competent in the Sheriff Court," as Mr. Wilson states in his "Sheriff Court Practice," 2nd edition, p. 365, and see also p. 53. Mr. Wilson has been good enough to explain to me in a letter that by this statement he only meant "all adjudications in use prior to 1672."

If the statement had so stood in his "Sheriff Court Practice" I should probably not have taken exception to it; for although not

quite accurate, as there is, as I shall show presently, no reason to suppose that adjudication in implement or adjudication in security had ever been used in the Sheriff Court, these are, comparatively speaking, minor varieties of this species of action. But until I received this explanation I could scarcely suppose that in a section headed "Action of Adjudication" the most important kinds of adjudication, adjudication for debt against the original debtor or against his heir who does not renounce, were intended to be excepted from the statement, "All adjudications in use were at one time competent to the Sheriff Court."

The reason I gave in "Court of Session Practice," i. p. 207, note (*d*), for objecting to this statement was that "adjudications were for the first time introduced by 1672, c. 19, which expressly gave the jurisdiction to the Court of Session;" but this note, which alone Mr. Wilson quotes, must be read with reference to the text, and it will there be found stated that "the statute 1672, c. 19, which conferred the jurisdiotion upon the Court of Session applies only to those adjudications which come in place of apprizings." Mr. Wilson is of course quite correct in saying that adjudications *contra hereditatem jacentem* and adjudications in implement were in use prior to 1672.

These kinds of adjudications are also dealt with in the text of the same section of the "Court of Session Practice." As regards the former I have already mentioned the position there laid down. It was undoubtedly at one time used in the Sheriff Court, and possibly it may be so still, although not in practice brought in that Court. In the case of *M'Lachlan* v. *Bennet* (15th June 1826, 4 Shaw, 717), where an adjudication *contra hereditatem jacentem* had been brought in the Sheriff Court, its competency was regarded as so doubtful that a new adjudication was led in the Court of Session (see p. 718 of report). Stair, I may observe, treats both this kind of adjudication and adjudication in implement as Court of Session actions in a passage which though long is worth quoting: "Adjudication upon renunciation to be heir is *remedium extraordinarium* introduced by custom where apprizing could have no place. . . . This remedy is introduced by the Lords, who having ample power to administer justice in all cases and to make order to that effect, do supply the defect of the law or ancient customs by such new remedies as such new occurring cases do require, amongst which adjudication is a prime one, which Craig testifieth to have been unknown to our predecessors; and being but recent in his time, and few decisions therefrom, the nature and effect of it was little known, but is now by course of time further illustrated. Adjudication hath place in two cases. The first and most ordinary is when the heir renounces to be heir, in which case adjudication is competent whether the debt to be satisfied be liquidated or not. The other is when the obligement to be satisfied consisteth *in facto* and relateth to a disposition of particular things, which disposition or obligement not being fulfilled by the debtor or disponee, though all

ordinary diligence be done them, ajudication taketh place to make the same effectual" (iii. 2, 45).

As regards adjudications in implement, Erskine indeed says, in a passage of his Institutes I also refer to, that it is probable they might be competent in the Sheriff Court, but he adds, "this is a fact which hath not been fixed either by our writers or decisions." I am disposed on this point to accept the opinion of Stair (iv. 51, 9), that this kind of adjudication was an equitable remedy for which the Court of Session introduced a new form of action, and to conclude that it has been for this reason and because declaratory conclusions are generally necessary in it, deemed in practice an action peculiar to the Court of Session.

If there was any case to the contrary it would probably by this time have been found.

Mr. Wilson in his letter to you says, "If other adjudications were in use prior to 1672 [*i.e.* other than those *contra hereditatem jacentem* and in implement], I conclude that they were also competent in the Sheriff Court. If the action was competent at all in the Sheriff Court, it is exceedingly improbable that it was competent only in the complicated cases which I have mentioned, and not competent also in the other, which are comparatively simple cases."

But the question is not one of probability but of fact.

The only kinds of adjudication known to the law prior to 1672, other than adjudications *contra hereditatem jacentem* and in implement, were adjudications in security, which, as Mr. Bell mentions, "had been adopted by the Court of Session as an equitable remedy in cases where apprizing was not competent" (Commentaries, iii. 13, 9; Shaw's ed. ii. p. 953).[1] The other kinds of adjudication which, whether comparatively simple or not, are the leading kinds of adjudication were then introduced by statute for the first time instead of apprizing, and placed under the exclusive jurisdiction of the Court of Session.

Apprizings had indeed been competent to the Sheriff, but his duty in regard to them was chiefly ministerial, and had fallen into the hands of messengers-at-arms as Sheriffs in that part. It was to correct the abuses to which that practice had given rise that the statute of 1672 was passed. Mr. Wilson closes his letter to you by remarking that "the point at issue is not of great importance, but it well illustrates the unwillingness of all writers in the Court of Session either to admit that heritable jurisdiction ever belonged to any extent to the Sheriff Court, or to relate fully the way in which it was lost."

It is scarcely equitable to involve all writers in the Court of Session in a condemnation, even if just, pronounced against one of the youngest of their number; but perhaps in this sentence too the word "all" means only "one or two," or possibly only "one."

[1] Mr. Wilson, by a slip in his letter to you, has said, "The adjudications in security is the only kind of which it may be safely said that it was introduced after 1672."

If so, the writer intended appeals with confidence from this judgment to all persons who have studied the history of our law.

Matters of historical fact cannot be altered because the writer who refers to them happens to write in the Sheriff chambers or the Parliament House.

Let me add, to speak explicitly on a subject which has had perhaps something to do with the statements both in the "Sheriff Court Practice" and in Mr. Wilson's letter, that the claim of the Sheriff Courts to an increase of jurisdiction, of which he is an able advocate, cannot, it seems to me, be rested on their past history. Its true ground is their present condition, the learning which now distinguishes their judges and the higher education of their practitioners, as well as that simplification of the law and procedure, which though for the present at a standstill will, I hope, before long be resumed.

It is of very little use for this purpose to refer to times when local justice was administered in by far the larger portion of Scotland by heritable judges and their bailies, or even to that later period when "practitioners were scarce and each Sheriff thought himself lucky if he could attach a few respectable persons to his Court" (Wilson's Sheriff Court Practice, p. 32).

In the introduction to the "Court of Session Practice" I have endeavoured to show the gradual origin of a central Supreme Court in Scotland, and so far from disguising, have laid emphasis on the fact that its institution led, and was intended to lead, to a great restriction of the jurisdiction of the local Courts; fortunately for Scotland, for that restriction meant in the main in the sixteenth and seventeenth centuries the substitution of settled law for arbitrariness and injustice. That the circumstances of our own times are altogether different, and that their difference must receive full weight in any readjustment or reform of the Courts in Scotland and their jurisdiction, no writer or practitioner in the Court of Session can refuse or should be unwilling to acknowledge. But neither a work on practice nor the discussion of a point of legal history is the proper place for schemes of law reform. The questions, what the law is, what the law was, and what the law ought to be, are distinct questions, which are apt to be confused when not kept separate.—I am, Æ. J. J. MACKAY.

7 ALBYN PLACE, *20th October* 1879.

Reviews.

The Parliament-House Book for 1879-80. Compiled by W. BURNESS. Fifty-fifth publication. Edinburgh, 1879.

As human beings get on in years they generally acquire a certain obesity of figure which contrasts strongly with the slimness of

earlier life. This is too, we find, the case with our old friend the "Parliament-House Book." Unlike many of its human compeers, however, its growing rotundity of form does not detract one whit from its general usefulness; on the contrary, it has the advantage in this respect, for the more bulky it becomes the more is its usefulness extended. The present issue not only keeps up the high standard of its predecessors but improves upon it. Nearly twenty pages of additional matter are given, including a useful table showing the effect of the past year's legislation, in compact and easily understood form. Amongst the Acts of Parliament passed last session are given the Bankers' Books Evidence Act, the Act relating to the Office of Lord Clerk-Register, the Conveyancing and Lands Transfer (Scotland) Amendment Act, the Valuation of Lands (Scotland) Amendment Act, the Companies' Act, and several others. The remainder of the information is as full and complete as usual, and, so far as we have been able to test it, extremely accurate, several small errors in detail which we noticed last year having been put right. We congratulate the "Parliament-House Book" on its advancing age, and may safely prophesy a long and vigorous life to it.

Handbook of the Roads and Bridges Act, 1878. BY DANIEL MACBETH, Advocate. Edinburgh: Bell & Bradfute, 1879.

We received this volume some time ago, but pressure on our space has prevented our noticing it till now. The author has written a very full summary of the various provisions of the Act, bringing them under appropriate headings and expressing them as far as possible in untechnical language. He has also added some notes which serve to elucidate the meaning of the Act or to point out discrepancies therein. The text of the Act itself with some other relative statutes is next given, and a very full analytical index concludes the volume. Mr. Macbeth seems to have performed his work carefully and well, and we do not doubt that the Handbook will be found useful to those who are interested in the working of the Act.

Obituary.

W. OLIVER RUTHERFURD, Esq. of Edgerston, Advocate.—We have this month to chronicle the departure from amongst us of one who was not only the oldest surviving member of the Faculty of Advocates, but who was probably the father of the whole profession, the oldest lawyer, in all likelihood, in the world. Had he lived but a few months longer he would have completed his ninety-ninth year, having been born on the 15th of March 1781. Barely three years previously the great Lord Chatham had died, and the child now born

was destined not only to see the entire career of his brilliant son William Pitt, but to outlive every prominent actor in the affairs of the close of last century. He was not a mere child at the period of the French Revolution; when the battle of Waterloo was fought he was of an age when many in these days are thinking of retiring from the army. He had seen twenty-four Parliaments summoned, and had witnessed changes in the social and political life of the country such as few men ever have done, or perhaps from the peculiar circumstances of the times ever will do. He had been at the Bar no less than thirty-one years before the present oldest practising member was called, and was Sheriff of one county for the period of sixty-one years.

The deceased gentleman was the son of the proprietor of Dinlebyre in Liddesdale, where, as we have said, he was born in 1781. He was called to the Bar in 1803, a period when the Parliament House was at the beginning of its greatest glory. The courteous and genial Sir Islay Campbell presided over the Court, and the eccentric Eskgrove, commemorated by so many good stories in the annals of Cockburn, was Lord Justice-Clerk. Hermand, Meadowbank, and many others whose names are hardly known to this generation, occupied places on the Bench, while at the Bar there were the first flickerings of that flame of literary genius which was afterwards to make Edinburgh shine forth as a centre of intellectual culture. When Mr. Oliver came to the Bar the *Edinburgh Review* had been but a few months started, and Scott, though he had been some time in the profession, had not yet produced anything to mark him as either poet or novelist. In the keen and brilliant atmosphere of the Parliament House, however, Mr. Oliver was not destined long to remain. He was appointed Sheriff of Roxburghshire in 1807, succeeding his father in that office, and four years afterwards he was made Convener of the County, so that it may be said that during his entire life the work he did was done in connection with the county to which he in so many senses belonged. That work was done diligently and well: as Sheriff his decisions were short, practical, and to the point, arriving generally at the true conclusion more by force of sound common sense and love of justice than by any process of elaborate legal reasoning. Both as Sheriff and Convener his conduct of business gave universal satisfaction; to the latter office he was re-elected year after year long after he had expressed a wish to resign, and it was only in 1875 that he at last insisted on laying down an honour which he had so worthily worn for so long. In 1858 he was entertained to dinner by the Sheriffs of Scotland on the occasion of his jubilee; in the same year a similar compliment was paid him by the procurators of Roxburghshire; and the Commissioners of Supply presented him with a portrait of himself, which now hangs in the Court-room at Jedburgh. In 1834 Sheriff Oliver succeeded, on the death of his uncle, Colonel Rutherfurd, to the estate of Edgerston, and assumed

the name of Rutherfurd in addition to his own. We may sum up our notice of this excellent specimen of a Scottish gentleman of the old school in the words of a contemporary:—

"The distinguishing features of Mr. Rutherfurd's character were a sterling rectitude and honesty of purpose, a manner simple, straightforward, and refined, and an intuitive clearness of judgment, which, without any specific system of argument, almost invariably led him to a sound conclusion upon any point he was called upon to decide.

"As a landlord he was kind and generous, ever proceeding upon the principle of 'live and let live.' To his dependants and all about him he was devotedly attached, and was consequently much beloved and revered by them. The mansion-house at Edgerston was generally full of company, and there it was his delight to practise an old-fashioned patriarchal hospitality. Till within a few days of his death, his general health continued all but unimpaired. A sincere and unaffected piety marked his whole life and conversation; and now that he has been at last so suddenly called to rest, the venerable and familiar form will long be missed from the county meetings at Jedburgh; from the little church at Edgerston, where he was a regular and devout worshipper; and from the home where, most of all, he shone as a thorough Christian gentleman, exemplifying to all around him the happiness, comfort, and content which virtuous youth imparts to a ripe old age.

"Mr. Rutherfurd had a numerous family of sons and daughters, all of whom, however, have predeceased him save his two eldest sons—Captain W. A. Oliver Rutherfurd (his heir) and Major Rutherfurd. No man was more widely known and esteemed in the Border district, and there is none whose death could have awakened more widespread interest and regret."

James Maidment, Esq., Advocate.—For the second time within a few weeks the Faculty of Advocates has been deprived of its oldest member. On Mr. Oliver Rutherfurd's death the senior member of Faculty was Mr. James Maidment, and now the hand of death has removed his name from its position at the head of the roll. The news of his death reach us as we are going to press, but the following notice, taken from the *Edinburgh Courant*, may interest our readers:—

"Mr. Maidment was the descendant of a Northumberland family, and an ancestor on the mother's side was the celebrated Dutch patriot, John Van Olden Barnevelt. He was born in London towards the end of last century, his father having been a solicitor there. Mr. Maidment was called to the Scotch Bar in 1817. Early in life he evinced a taste for literary pursuits of an antiquarian nature, which continued with him to the end. The tendency of his mind was similar to that of Sir Walter Scott, and it was his fortune to attract the novelist's attention. An intimacy, indeed, prevailed

between them, which led not only to considerable literary intercourse, but also to cordial social relations. Mr. Maidment's first publication goes back for at least fifty, if not nearly sixty, years, and throughout his whole life he was continually adding to the stores of antiquarian literature, until at last his name may be said to have become associated with as long a list of publications of that description as any in Europe. He was an intimate friend of the late Mr. Riddell, the most profound of all genealogical antiquarians, and after his death he certainly took the position of being the first advocate in Scotland in cases involving genealogical inquiries. Mr. Maidment as a peerage lawyer had only one equal. He published in 1840 'Reports of Claims preferred to the House of Lords in the Cases of Cassilis, Sutherland, Spynie, and Glencairn Peerages.' At a later period he took a specially prominent position in the *Mar Peerage* case, and his paper in connection with it ably pleaded the claim of Mr. Goodeve Erskine. His opinions on general legal cases were also regarded as sound, but his rhetoric was by no means equal to his diction. In the days when written pleadings were more frequent than now in the Court of Session, those which came from the pen of Mr. Maidment bore evidence to the great ability of their author.

"Amongst Mr. Maidment's literary efforts in more recent years may be mentioned 'The Dramatists of the Restoration,' which was edited by him for our townsman, Mr. Paterson, with the assistance of Mr. W. H. Logan. The work extended to no fewer than fourteen volumes octavo. He also edited 'Scottish Ballads,' illustrative of the history of Scotland, a work in two volumes, which was published in 1868; 'A Book of Scotch Pasquils,' published in 1869; and a 'Packet of Pestilent Pasquils,' issued in the same year. At an earlier period he contributed to Thomson's 'Border Miscellany,' a periodical edited by his friend Mr. Logan, then in Berwick-on-Tweed; edited the 'Roxburghe Revels' and other relative papers, including answers to the attack on the memory of the late Joseph Haslewood, F.S.A., with specimens of his literary productions, and was the author or editor of many other publications, including comments on his own genealogical collection. For almost all of these a price is now paid at least threefold that at which they could at one time be bought, and even then the works were of an expensive character. With tastes such as Mr. Maidment possessed he was an extensive collector as well as author, and his large and spacious house in Royal Circus is filled with books and prints of the most curious and *recherché* character.

"The deceased gentleman was latterly engaged in preparing for the Earl of Crawford and Balcarres an account of his genealogical collections, one of the most extensive in the kingdom. He had further on hand the *Duffus Peerage* case, to which he was devoting himself for a claimant in England.

"Although Mr. Maidment had reached the advanced age of eighty-

six or eighty-seven, his memory continued unimpaired to the last. The recollection he had of events that took place during his prolonged life, together with the most minute of his literary, antiquarian, and other investigations, struck with amazement all who had intercourse with him. His intellect was perfectly clear, and every quality that went to constitute a man of distinguished parts continued in the most unclouded condition. Though he had latterly to contend with the deficiency of impaired sight, brought on, it is supposed, by his deciphering of old parchments, he continued an ardent reader. He was much affected by the loss of a promising daughter several years ago, and from that time was confined to the house. A kind-hearted and amiable gentleman, he peacefully, as he had lived, slept away on the evening of the 26th October.

"The wife of Mr. Maidment died in 1862. He is survived by a son."

J. F. Rodger, Esq., S.S.C.—We regret to announce the death of the above gentleman at the age of fifty-six. A native of Arbroath, he came to Edinburgh in 1846, and entered the office of Messrs. Maclachlan & Ivory, W.S., in which firm he was assumed as a partner ten years later. He eventually became a member of the Society of Solicitors before the Supreme Courts, and was frequently an office-bearer in that body. Besides being an energetic and acute lawyer, he possessed considerable literary and musical taste, which rendered him deservedly popular among a large circle of friends.

P. S. Banks, Esq., S.S.C.—A well-known and universally respected official of the Court of Session has recently passed away in the person of the above gentleman. For about forty years he had acted as clerk to the present Lord Justice-General, first when he was at the Bar as Mr. Inglis, and afterwards on his being raised to the Bench. When Mr. Inglis took his seat as Lord Justice-Clerk in 1858, Mr. Banks, as usual in such cases, was appointed Keeper of the Rolls of the Second Division, and when in 1869 the Lord Justice-Clerk assumed the Presidency of the Court, similar duties devolved upon Mr. Banks in the First Division. His official duties brought him into contact with almost all the practitioners in the Court of Session, and by all he was esteemed in a very high degree from the courtesy with which he performed his duties, and the sterling integrity of his character.

The death is announced of W. Scott Steuart, Esq., S.S.C. (1849.)

George Christison Adams, Esq., S.S.C. (1851), Official Searcher of Records in her Majesty's General Register House, died on the 20th October.

The Month.

Popular Law-Reporting.—In reference to an article which appeared in our August number on this subject, we notice that an action has been raised in the Court of Session by Robert Richardson, a Sheriff's officer, against the publisher of the *Edinburgh Evening News* for £500. In July last a paragraph appeared in the paper in question announcing that a certain summons had been called in Court, which it is alleged contained certain slanderous statements concerning the pursuer. The summons, however, it may be remarked, was not called against Richardson, but against another defender altogether. The case being as yet *sub judice*, we cannot comment on it, but the following proceedings occurred at the adjustment of an issue, in order to have the case tried by a jury:—

"Counsel for the defender contended at great length that he was entitled to publish a summons, seeing that it was a public document, the moment it was called in Court. On the other hand, the pursuer maintained that a summons when called was not a public document, and that the newspapers were not entitled to publish it.

"At the close of the debate, Lord Craighill said that hardly anything more important could be brought before the Court than this question. There was no doubt that the proceedings of a court of justice, according to the policy of the law, ought to be the property of the world. The public were quite entitled to be present, and any member of the public was entitled to communicate, if he did so honestly and fairly, what transpired. At the same time, if that doctrine were to be carried to the length to which counsel for the defender put it, a very great injustice would be done to one of the parties in the litigation. There were many strictly technical and judicial steps that were taken before the stage was reached at which a case could be said to be before the Court and fit to be published to the world. Besides, the public had no interest to be informed before the proper time that a case was depending. A summons might be abandoned before it was called, or after it was called and before it was enrolled; and in several ways, which his Lordship pointed out, might be as completely terminated as if a judgment had been taken upon it. If the summons was to be made a public document before it was in a reasonable sense before the Court, the same ought to be done with the documents in the process. He could not, however, think that there was any policy of law in which this doctrine had been recognised. He thought that the rights of parties in this matter had been definitely settled by the Act of Sederunt of 11th March 1820, which authorized that summonses, etc., should be lodged with the depute-clerk; and these, with productions, were to be entered in the list for calling,

and thereafter they were not to be given up by the clerk, except when borrowed by the agent on his receipt, or when transmitted to some other officials of the Court. Now in this case the summons had been called. Up to this time it was quite apparent that not only was there no right on the part of a stranger to become acquainted with the summons, but there was express enactment that the Clerk of Court should not thereafter give it up except when borrowed by an agent. Then, in article second in this Act of Sederunt, callings by depute-clerks were not only to be performed *viva voce*, but by the exhibition of the lists. Here was the provision for publicity, and it was not what was contained in the summons, but what was set forth in the lists, that was to be published. His Lordship said he was willing to allow an issue."

Circumstantial Evidence.—In the old days, when "Apprentices of the Law" posed each other with difficult legal dilemmas in the Halls of the Inns of Court, such a case of circumstantial evidence as that just reported from Vienna would have afforded rare opportunities for legal hairsplitting. In July last year an unmarried seamstress named Leopoldine Haensel happened to be in confidential conversation with a female friend named Juliane Halkiewicz. To her Leopoldine imparted all her troubles, including the fact that she had a lover, and that she expected shortly to become a mother. She produced a bottle containing some liqueur, which, she said, "he," meaning her paramour, had given her, and, pouring out a glassful, she offered it to her friend. Juliane Halkiewicz, however, only just put her lips to the liquid, and declined to drink it, on the ground that it had a disagreeable odour; whereupon Leopoldine drank off the remainder of the contents of the bottle at one draught. She complained immediately afterwards that it had a strange taste, adding that she had drunk some of it two days before, and that it was then good. In the course of a few minutes she became unconscious, and died in her friend's arms. Looking at the fact that she had offered Juliane a glass of the liqueur, the police refused to adopt the theory of suicide, and began to search for the lover, of whom all they knew was that his Christian name was Leopold, that he was married, but childless, and that he worked as a journeyman tailor in a certain establishment. Acting on these indications they arrested one Leopold Winkeler, who exhibited great trepidation, but at the same time denied all knowledge of the deceased. A number of witnesses were, however, called to prove that Leopold Winkeler had repeatedly visited Leopoldine Haensel, and two neighbours of the latter deposed that a few hours before the poisoning he had been alone in the room of the deceased, while she had been absent to fetch some water and a bottle of wine. The theory of the prosecution was that Winkeler placed the poison in the liqueur-bottle during his mistress's absence. He tried, but unsuccessfully, to prove an *alibi;* and was, by a majority of eight

to four, found guilty. The man has been sentenced to death. The circumstantial evidence against him is certainly very strong; but would it suffice completely to satisfy an English judge and jury as to his guilt?

POMPONIUS, a celebrated law teacher of Rome in the sixth century, entered into a contract with a Roman citizen to instruct his son in the law. This was the contract: So many coins if the pupil became learned in the law, the test to be that he should win his first case before the tribunal. Pomponius turned over his pupil as perfected in his studies. The father brought suit against the master to set aside the contract, and retained his son to plead this his first case. "If my son gains his case the contract is made void. If he loses I am not bound." Pomponius answers: "If I fail in my defence the son wins his case, and I am entitled to my money. If I gain, the Court gives me the money by its decree." Which side had the law?

Dinner to Sheriff Barclay.—A dinner was given last month at Perth to this universally esteemed gentleman and popular judge, on the occasion of his completing his fiftieth year of service as a Sheriff-Substitute. A large and distinguished party assembled to do honour to the occasion, and the whole proceedings were of the most gratifying character. Since the first publication of this Journal, now twenty-three years ago, Sheriff Barclay has been a constant and valued contributor to its pages, and we may be allowed to express a wish that the learned and venerable Sheriff may still be spared for many years to perform the duties of his office with that satisfaction to all which he has ever displayed in their discharge.

MR. DAVID S. SHIRESS has been appointed to the vacancy in the Clerkship of the Court of Session caused by the death of Mr. Macritchie.

MR. GEORGE C. BANKS has been appointed Keeper of the Rolls of the First Division in room of his late father.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF MIDLOTHIAN.

Sheriff HALLARD.

STORIE *v.* FORBES AND ROBERTSON.

School Board Election—Right of clerk to returning officer to vote.—The interlocutor explains the circumstances of the case :—

"*Edinburgh, 4th June* 1879.—The Sheriff-Substitute having heard parties' procurators on the closed record, Finds that the returning officer in the

election in question rightly refused to give a voting paper to the pursuer: Sustains the defences to that effect: Dismisses the petition: Finds the defender Robertson (by whom alone appearance has been entered) entitled to expenses: Allows an account thereof to be given in, and remits the same when lodged to the Auditor of Court to tax and report, and decerns.

"FREDERICK HALLARD.

"*Note.*—The pursuer in the election in question acted as clerk to the returning officer, who consequently refused to deliver to him a voting paper. The question is whether this refusal was right.

"Neither in the Education Act of 1872, nor in the general order issued by the Educational Department in November 1878, by virtue of its statutory powers, is any special function intrusted to the clerk of the returning officer. No such official, indeed, is even alluded to in the statute. In section 2 of the general order mention is made of the returning officer 'and his clerks.' These persons must of course make the promise and declaration of secrecy prescribed by section 3, and would be liable in such penalties as may by law be provided for its violation.

"It is thought that the judgment of the returning officer in the present instance was right, as his clerk, the pursuer, had certain ministerial duties to fulfil, duties which, however slight they may have been in this case, are protected in some instances by the obligation of secrecy. Except in th specially foreseen case of equality, the returning officer has no vote. No express enactment provides this disability. It is on principle that he is excluded, a principle broad enough to include his clerk. The relation between them is like the relation between the clerk of Court and the judge; and in that view of the matter the principle affirmed in *Macbeth* v. *Troy and Innes*, February 8, 1873, is not altogether inapplicable. But public policy and constitutional principle alike require a jealous watchfulness over purity of election, and as a consequence the separation between the duty of an official and the privilege of a voter. Any one in the position of the pursuer must elect between his function and his franchise. On these grounds the Sheriff-Substitute has come to the conclusion that the returning officer did right in refusing to let the pursuer have a voting paper. If so the defence must prevail. F. H."

SHERIFF COURT OF LINLITHGOW.

Sheriffs MONRO and HOME.

PRENTICE *v.* BLACK AND GARDNER.

The pursuers in this case are Annie Black or Prentice, wife of Hugh Prentice, joiner, residing at Garscadden Works, Duntocher, and the said Hugh Prentice, as administrator-in-law for his said wife, and for all right and interest competent to him in the premises, against Campbell Black, cooper, sometime residing in Engine Street, Bathgate, now residing in Leith, executor *dative qua*, one of the next of kin decerned and confirmed, of the late Alexander Black, shopkeeper, Bathgate, and James Gardner, solicitor, Bathgate, cautioner and surety of the said Campbell Black. The action was raised on 20th June 1878, and concludes for decree against Campbell Black to produce a full account of the intromissions as executor of his father, and to pay the pursuers (first) the sum of £20, and to ordain the said Campbell Black and James Gardner, conjunctly and severally, to pay the sum of £10, or such other sum as may appear to be the true sum due to Mrs. Prentice; and failing an account being produced, to ordain the defender Black (1) to pay the sum of £20, and to ordain him and Mr. Gardner, conjunctly and severally, to pay the sum of £10—making together the sum of £30—with interest from 30th November 1874, and for expenses. Pursuers plead—(1) The female pursuer being a daughter of the deceased Alexander Black, and the defender being his

executor, the pursuers are entitled to decree—the decree against the defender Gardner being restricted to £10 of principal; (2) the document No. 7 of process, described by the defender Black as a renunciation and discharge, not being stamped, cannot be looked at; (3) even assuming that the said document was intended to be obligatory on the female pursuer, the male pursuer not having subscribed the same, that document cannot affect the rights of the pursuers; (4) the share falling to the female pursuer of her father's moveable estate being her husband's in virtue of his *jus mariti*, could not be renounced or discharged without the husband's consent and concurrence. The defender Black pled—(1) The pursuers having expressly renounced and discharged any claim competent to them for a share of the estate in question, they are barred thereby from insisting in the present action; (2) the estate having been divided with the full knowledge and approval of the pursuers, in accordance with the verbally expressed wishes of the deceased, it is incompetent for them now, after a lapse of upwards of four years, to object to the division so made; (3) *mora* and taciturnity; (4) *rei interventus;* (5) homologation; (6) Alexander Angus, the alleged *dominus litis*, ought to be compelled to sist himself as a pursuer in the action. The defender Gardner pled—(1) The defender having by said bond of caution bound himself to the extent of £10, and there being five representatives of the deceased interested in the same, the share thereof falling to the pursuers is one-fifth, being £2; (2) the defender having offered, and subsequently consigned in the hands of the Clerk of court, and the pursuers having refused to accept said sum of £2, ought to be assoilzied, with expenses; (3) the female pursuer, in the presence and with the consent of the male pursuer, and they both, with joint consent and assent, having renounced their right to the funds in dispute, are not entitled to insist in the present action; (4) the defender having admitted liability to the extent of £10, and having called upon the pursuers' agent before service to institute this action as against him in the Small Debt Court, ought to be found liable in Small Debt expenses only should the pursuers prevail against him; (5) *mora*. The Sheriff-Substitute having heard proof at considerable length on both sides, pronounced the following interlocutor:—

"*Linlithgow*, 4*th July* 1879.—The Sheriff-Substitute having again considered the closed record, with the proof adduced and whole process, and having heard parties' procurators thereon, Finds that the action has been brought by the female pursuer, Annie Black or Prentice, with consent of her husband, Hugh Prentice, as a daughter and one of the family of the now deceased Alexander Black, late shopkeeper in Bathgate, against the defender, Campbell Black, a cooper, and a son of the said family, to account, as executor decerned and confirmed, to their father, the said Alexander Black, and intromitter with his estate, and against James Gardner, writer, Bathgate, as cautioner in said confirmation: Finds that the said defender denies that he is bound so to account to said pursuer: Finds, on the proof, that the father of the parties, the said Alexander Black, died upon the 20th of April 1874, and that he left a family of six children, three sons and three daughters, of whom the female pursuer and the defender are two: Finds that the said sons and daughters were all grown up at the time of the death, and that the two elder sons had been set up in business at a distance, and carried on separate trades and occupations in Manchester and Edinburgh; that the defender, the youngest of the three sons, was the only one remaining at home; that of the three daughters, the eldest, the present female pursuer, was the only married one, the other two, Janet and Eleanor, remaining at home and keeping their father's house, and assisting their said youngest brother in a small shop in Bathgate: Finds that the old man appears to have been a prudent and thrifty individual, and a careful and anxious father, solicitous about the present and future welfare of his children; that during his life he assisted materially the settlement in business of those of his sons who went from home, and liberally fitted out the daughter who was married: Finds that he showed himself particularly anxious about the

comfort and position of his said two unmarried daughters after his death, as not being already provided for: Finds that he had gathered a little money in the course of his life, and that he had, at the time of his death, two sums in bank of £60 and £200 respectively on deposit receipts, besides a sum of £30 in the house, and a gold watch: Finds that in pursuance of his intention of providing for his said two unmarried daughters and his remaining son, the defender, he, shortly before his death, had the deposit receipt for £60 transferred into his daughter Eleanor's name, and he indorsed and delivered the one for the £200 to his said son, the defender, with instructions to get it transferred into his own and his other daughter Janet's name, and that it was to be for the benefit of himself, the said defender, and the said daughter, after his death: Finds, however, that this instruction of the father's as to getting the said deposit recept transferred was not carried out by the defender before his said father's death, and that confirmation was required before it could be done: Finds that on the day of the father's funeral, the whole family met and assisted at it, and that afterwards they all assembled at a family meal and had a friendly talk about their father's affairs, the male pursuer, Hugh Prentice, being also present: Finds that at said meeting their father's said intentions and proceedings as to the said sisters and younger members of the family were duly explained, and expressions were used by the two elder brothers, James and Walter Black, approving of the same, and cordially agreeing therewith: Finds that in furtherance of and explanatory of this resolution, a memorandum or jotting was made out, and to this writing the said two brothers, Walter and James, and the said sister Annie, the present female pursuer, adhibited their names, the said three forming the elder branches who had already been assisted by their father: Finds that the said female pursuer, when so adhibiting her name, was well aware of the tenor and object of said writing or memorandum, and that the same was intended to carry out more effectually the already expressed intention of the said brothers subscribing, not to make any claim on their said father's estate, but to let it go as their father had wished for the benefit of the younger branches, who had not had the advantage that these others subscribing had had from him, and that she intended thereby to show and express that she also joined them in giving up all claim she also might have therein: Finds that as to all three this has been abundantly proved by what took place, and was said among the parties at said meeting, and also by what occurred directly after at the defender, Mr. Gardner's, door, when at least one of the parties subscribing was present, and by the long silence and acquiescence by the said parties since, years having been allowed to elapse without any demand of any kind having been made upon the defender, and the present female pursuer especially and her said husband having lived in close proximity to the said defender most of the time, and having been often made aware of what he was doing in regard to said estate in her frequent conversations with the sisters: Finds that any present quarrels among the said parties cannot be allowed to open up any former closed transactions between them: Finds that said memorandum or writing is not one requiring a stamp, being a mere jotting or minute explanatory of what had been already verbally agreed on, and for the mere satisfaction of the parties, and, though not holograph or tested, has been, as a writing, homologated by all that has been allowed to follow thereon in the course of the years elapsed since its date unchallenged by any of the parties interested therein, or any claim having been made by them thereanent: Finds that the said female pursuer, Annie Black or Prentice, had the authority of her husband, the male pursuer, who was present at the time, and assented to her putting her name to said document or writing; and finds it so proved, and by all that occurred at said meeting, that the said female pursuer, with full concurrence of her husband, the said male pursuer, did on said occasion agree, along with her said brothers, not to make any further claim on her said father's estate.

"Therefore finds the defender, the said Campbell Black, not bound to account to the said pursuer, Annie Black or Prentice, or to her said husband,

the said Hugh Prentice, as craved in the prayer of the petition, and accordingly assoilzies the said defender, James Gardner: Finds them entitled to expenses, of which appoints an account to be given in, and remits the same when lodged to the auditor of Court to tax and to report, and decerns. FRANCIS HOME."

The pursuers appealed against this judgment to the Sheriff, who pronounced this interlocutor :—

"*Edinburgh, 3rd September* 1879.—The Sheriff having considered the reclaiming petition for the pursuers, and answers thereto, Recalls the interlocutor of the Sheriff-Substitute, dated 1st July last: Finds that the female pursuer was not entitled to renounce or discharge (if she did or attempted to do so) her share of her father's estate without the consent or concurrence of her husband: Finds the sum of £25, as the amount due by the defender, Campbell Black, as the share of the female pursuer, due from her father's estate, and decerns against the said Campbell Black accordingly : Finds the pursuers entitled to expenses subject to modification : Appoints an account to be given in, and remits the same to the auditor to tax and report the same to the Sheriff.

"GEO. MONRO."

Act.—Dodds.——*Alt.*—Fergusson—Gardner.

SHERIFF COURT OF ABERDEENSHIRE.

Sheriffs GUTHRIE SMITH and DOVE WILSON.

DICKSON *v.* SHEPHERD.

Reputed ownership—Contract of hiring.—The interlocutor explains the circumstances of the case.

This was an action at the instance of Alexander Dickson, carter in Aberdeen, against William Shepherd, box manufacturer there, concluding for delivery of a lorry which the pursuer bought and got delivery of from a carter named Brown, whose name was then painted on it, and which, after being in the pursuer's possession for a week, the defender removed from the pursuer's yard to his own premises and refused to return, on the ground, as he alleged, that the lorry was built to his order and paid for by him, and was only on hire to Brown, who had no right or authority to sell it to the pursuer. The points in the case are clearly set forth in the Sheriffs' interlocutors. Sheriff Wilson, before whom the case was tried, pronounced the following interlocutor :—

"*Aberdeen, 30th June* 1879.—Having resumed consideration of the cause, Finds in fact (1) that the lorry in dispute was made on the order of the defender, and was paid for by him ; (2) that the defender and Alexander Brown, carter, entered into an agreement, whereby the lorry was to be used by Brown, and was to become his property on his paying its cost to the defender, either in money or in cartages ; (3) that in consequence of this agreement, Brown obtained possession of the lorry, and with the acquiescence of the defender, had his name painted on it, and used it in every way as if he were its true owner ; (4) that Brown, in breach of his agreement with the defender, and before he had paid for the lorry, sold it to the pursuer for a price instantly paid ; (5) that, at the time of the purchase, the pursuer was without knowledge of the agreement between Brown and the defender : Finds in law that the defender, although himself true owner of the lorry, having acquiesced in Brown assuming that character, is barred from challenging a sale to a person who had no knowledge of the arrangement between him and Brown : Therefore ordains the defender to deliver the lorry to the pursuer as prayed for : Finds neither party entitled to expenses : And decerns.

"J. DOVE WILSON.

"*Note.*—The findings in the preceding interlocutor sufficiently explain the view which I take of the merits of the case. The evidence of the maker of the lorry, together with the written agreement entered into at the time

between the defender and Alexander Brown, show what was originally intended. Unfortunately, what was done went farther. Brown was allowed not only to possess and use the lorry, but to put his name on it; and he was thus made to appear to the public as if he were in every respect the true owner. This implied that he had the power of sale, and having been done with the defender's acquiescence, the defender is barred from objecting to a sale, unless he can prove that the person purchasing knew or ought to have known of the arrangement. This raises the points—Whether there was a sale, and if so, whether the pursuer can be fixed with any knowledge of the arrangement. The sale is proved, and though Brown must have been to some extent under the influence of drink, there is no ground for saying that his condition was such as to make him incapable of transacting business. As to the knowledge, the only person who objected to the sale was Brown's wife, and her objections had nothing to do with the transaction between the defender and her husband, for she believed the lorry was his own. I therefore think that the sale will have to stand.

"With regard to expenses, I do not think the pursuer entitled to them. Though it is not proved that he knew of the transaction between the defender and Brown, enough is proved to show that as a prudent man he ought to have had nothing to do with the purchase. He knew that Brown had been drinking previously, and although Brown was not drunk at the moment, he must have known that he could not have been free from its effects. The sale was not conducted like an ordinary business transaction, but was arranged late one night, and followed by delivery before daylight next morning. The delivery was made with Brown's wife standing by and protesting that the pursuer was taking away her children's bread, and that if he bought, he would rue the sale. In these circumstances, although I cannot say that the pursuer had any knowledge of Brown's fraud upon the defender, or that the sale was illegal, I think prudence should have said to him to make farther inquiry before he dealt with Brown. The first result of his buying was that Brown got the price, went to drink again, and lost it, without his family getting any good from it. The second result was that the defender lost the money he had spent in a well-meaning attempt to assist a man to better his position. And the third result of the pursuer's imprudent purchase has been this litigation, and looking to its origin, I see nothing unfair in making him pay his own share of the costs of it.

"J. D. W."

The defender appealed to the Principal Sheriff, who has now pronounced the following judgment:—

"*St. Fillans, 10th September* 1879.—The Sheriff having heard parties' procurators, and considered the proof, affirms the judgment of the Sheriff-Substitute, and decerns. J. GUTHRIE SMITH.

"*Note.*—One cannot read the evidence which has been led in this case without feeling that the defender has not been well used by the man whom he wished to befriend—a carter named Alexander Brown. This person, wanting to get a lorry of his own for use in his business, asked Mr. Shepherd to be security for the price. Mr. Shepherd would not be security; but offered to buy a lorry and allow him to use it, on the footing that Brown should pay the price as he was able, but until it was all paid there should be no transfer of the property. A recent case in the Second Division shows that a transaction of the sort could have been legally carried out had it been gone about in the right way. But Mr. Shepherd, having paid the builder of the lorry, and allowed Brown's name to be painted on it, contented himself with taking this document: '*Aberdeen, 9th November* 1878.—I, Alexander Brown, hereby acknowledge that the lorry built, etc., and on which my name is painted, was paid for by James Shepherd, Esq., Spring Garden, and belongs to him.' Thereafter it was constantly used by Brown in his business as if it were his own property, down to the 15th February 1879, when he sold it to the pursuer, Dickson, for the sum of £16. The legal effect of these facts was that as

between Shepherd and Brown the lorry remained Shepherd's property, but as between Brown and the outside public it was his, on the principle of reputed ownership, to sell, impledge, or otherwise dispose of as he thought proper, unless the party with whom he dealt had notice of the actual relation subsisting between Brown and the true owner. If he had become bankrupt it certainly would have passed to the trustee. Had he painted his name on the lorry without Mr. Shepherd's knowledge or authority it might have been said that he had been guilty of a fraud on the original agreement, and a different question would now have arisen; but it is clear that it was done with his entire approval, because the fact is set forth in the writing which Brown executed, and the proof shows that Mr. Shepherd, quite properly, had his misgivings about it at the time. The question thus comes to be, whether the pursuer in making the purchase from Brown had notice sufficient to make him art and part in the fraud which the latter was practising on the defender. There were certainly circumstances in the transaction which would have prevented many men from having anything to do with it, and on that account the Sheriff-Substitute has rightly refused him the expenses of this action. But the Sheriff cannot say on the evidence either that the sale is impeachable on the ground of Brown's intoxication at the time, or that the pursuer had any knowledge of the claim over the lorry which was possessed by the defender. The judgment appealed against must therefore be affirmed. J. G. S."

Act.—M'Lennan.——*Alt.*—Clark.

SHERIFF COURT OF LANARKSHIRE.

Sheriffs Clark and Lees.

MULTIPLEPOINDING DICKSON.

Multiplepoinding—Arrestments in hands of police—Double distress.—Mrs. Mitchell invoked the aid of the police, as she thought Semple had made off with her money and two trunks. From the information she gave there was reason to suspect she and Semple had committed the crime of bigamy. He was in consequence apprehended. Two luggage tickets were found in his possession. By means of these the police got the two trunks from the railway company, and the two trunks and the money found on Semple were handed to the custodier of the police. Arrestments were laid in his hands at the instance of creditors of Mrs. Mitchell and of Semple. They also, on their release, claimed the goods and money. The custodier, Dickson, thereon brought the present action of multiplepoinding, and objection was taken to its competency. The Sheriff-Substitute pronounced the following interlocutor:—

"*Glasgow, 16th August* 1878.—The Sheriff-Substitute having considered the cause, Finds that the articles forming the alleged fund *in medio* were taken possession of by the police from the defender Semple on arresting him on a charge of bigamy: Finds that the said articles are not susceptible of arrestment in the hands of the pursuer at the instance of persons claiming to be creditors of Semple: Finds that there is no double distress: Finds the action incompetent: Dismisses it: Finds no party entitled to, or liable in expenses, and decerns.

"J. M. Lees.

"*Note.*—In the somewhat promiscuous plea stated for Mrs. Mitchell and Semple it is urged that there is no double distress, and the case of *Mitchells v. Strachan* (18th Nov. 1869, 42 Jur. 67) settles for better or for worse that a person is not entitled to raise an action of multiplepoinding based on arrestment unless more than one has been used in his hands. The diligence at the instance of the Messrs. Shepherd has been withdrawn, but there remains an arrestment by a creditor of Mrs. Mitchell, and also one by a creditor of Semple. These arrestments must, I think, be both taken into consideration. The claim made for the return of the articles in the hands of the police is a joint claim by

Mrs. Mitchell and Semple. Now I do not think they can in such circumstances validly object to a combination of their creditors' claims also. If so, there is double distress if the arrestments have been validly used.

"But it is contended that such arrestments are not competent. I could well understand such a plea being stated for the pursuer, as the inconvenience of arrestments in his hands might obviously be very great; for if it is competent for him to found on arrestments, it is competent for the creditors of a prisoner also, and in this way it might frequently happen that actions of multiplepoinding would be raised in the name of the representative of the Board of Police in regard to articles whose continued detention was necessary for the purposes of criminal administration. But here the objection is taken by the party from whom the articles were taken and by the party who claims to be owner of them.

"The provisions of the 101st section of the Glasgow Police Act seem framed to cover the case of articles found by the police or brought to them. Such articles, it is provided, the pursuer, as custodier under the Act, may deal with; and if the ownership is doubtful or disputed, he may request a magistrate to decide, on the verbal statement of the claimant or claimants, how the articles are to be disposed of.

"In this case the articles were taken possession of by the police, and the question is, Can such articles be arrested? The point is apparently a novel one so far as the recorded decisions show. The agent of neither party has been able to refer me to any case in point, and I have myself failed to find any. But I understand that my colleague, Mr. Sheriff Murray, in a case before him, either decided, as I have done above, or indicated a view to that effect.

"Now arrestment is not a competent diligence in every state of circumstances. Professor Bell in his Commentaries (i. 70) declares the general principle to be that 'wherever goods are held in mere custody by a person who having no right to detain them a moment after they are demanded, may, without illegality, be violently and *via facti* deprived of them by the proprietor, and who can claim no retention and oppose no *actio contraria* against a demand for the goods, the donor is to be held as himself having possession of them so as to exclude arrestment.' He then enumerates one or two cases in which arrestment would be incompetent, namely, goods in the custody of a servant, clerk, or steward, furniture in the possession of a person renting a furnished house from the debtor, and a post-chaise in the custody of a traveller. He says, 'perhaps the same rule would be applied in the case of illegal possession.' I apprehend there is now no doubt it would be. Indeed it appears to me that it would be contrary to the principles of justice to say that where goods had been stolen they could be arrested in the hands of the thief for an alleged debt of their rightful owner. A multiplepoinding brought by a thief would strike one as a somewhat whimsical form of action. The object of a multiplepoinding, so far as the raiser is concerned, is his exoneration, and if the thief could obtain that desirable result by an action of multiplepoinding, the consequences might not be conducive to good order.

"It is not alleged here that the articles were stolen or that their retention is necessary for the ends of justice. In such circumstances it seems to me that the person who has a natural right to the possession of them is the person from whom they were taken or his nominee. The goods were taken from Semple, and Mrs. Mitchell is his nominee or mandatory. *Prima facie*, therefore, there seems no good reason why, if the goods are to be given up, they should not be at once delivered to these claimants. Semple did not part with his possession of them voluntarily. Now it will hardly do to take a man's goods from him and then say, We cannot give them back; they have been arrested. It seems to me that in a case like this, where the possession of the arrestee is of a qualified and vicarious nature, and that possession obtained *brevi manu*, that the articles cannot be arrested.

"If I am right in so thinking, the case becomes a very simple one. If

Semple's creditors cannot arrest there is no double distress; and on the authority of *Mitchell's* case the action is incompetent.

"But though I think the case has been unjustifiably raised, it does not appear to me as one where expenses should be awarded. Semple and Mrs. Mitchell have, by their conduct or misconduct, led indirectly to the action being brought; and the other defenders, directly, by their incompetent use of diligence. The pursuer, too, is not in the position of an ordinary litigant, and the point is one of novelty and much difficulty. J. M. L."

To this interlocutor Sheriff Clark, on appeal, adhered "for the reasons assigned by the Sheriff-Substitute," and appended to his judgment the following:—

"*Note.*—Arrestment is the diligence whereby moveable property of a common debtor is attached in the hands of a third party, who holds it in proper *possession* as opposed to mere custody. Debts, consequently, due the common debtor may be attached, but no moneys belonging to him which are in the custody of his servant or factor, for in that case they are by construction of law in his own possession, he holding them through his agent. Nor when moveable property is seized by the officers of police for the ends of justice, it is held by them for that purpose only; and when that purpose has been served it must be returned. The police are mere custodiers, the person from whom the articles were taken is still in the legal possession of them, the police holding them are custodiers for him. From this it necessarily follows that such property cannot be attached by arrestment in the hands of the police."

Act.—Paterson.——*Alt.*—Torrance.

SHERIFF SMALL DEBT COURT OF ABERDEEN.

Sheriff Dove Wilson.

MELVIN *v.* SKENE.

Weights and Measures Act, 1878—*Legality of the hay stone of* 22 *lbs.*—On 16th October 1879 a small debt action was brought at the instance of John Melvin, crofter, Tarland, against John Skene, innkeeper, Tarland, concluding for £2, 16s. 6d., "being the balance of the price of a quantity of hay sold by the pursuer to the defender." The sum at issue was accounted for in this wise. The pursuer sold a quantity of hay to the defender which, he maintained, was sold by the imperial stone of 14 lbs. weight, and which the defender, on the other hand, averred he bought by the parcel of 22 lbs., according to the practice common in the district. The price was to be 6d. per stone, and the sum at issue consisted in the difference between the value of the hay in stones of 14 lbs. weight and its value when reckoned by stones of 22 lbs. weight, or "hay stones." Proof was heard as to the custom of the district and the special agreement in the case.

Sheriff Wilson said the case depended on the construction to be given to the clauses of the Weights and Measures Act, 1878. Two questions were involved in it: in the first place, whether a certain bargain for the sale of hay was made according to the hay stone or parcel of 22 lbs.; and, in the next place, if it were so made, whether such a bargain was legal. On the question of fact, he had come to be of opinion that the bargain had been made according to the hay stone. No doubt the presumption was in favour of its having been made by the imperial stone, because the imperial stone was the recognised weight of the country. But that presumption might, as matter of fact, be overcome by proof to the contrary, and he thought it was in this case clearly proved that the bargain was made by what was known as the hay stone. There had been a former bargain made between the parties a short time previously, and although they differed as to what was then said, this much was clear, that the hay was then measured by the hay stone, and had been paid for according to that weight. With regard to the present bargain the parties differed in the same

way as to what took place when the bargain was made, and the evidence of the defender was not very satisfactory upon that point. It was clear, however, that the hay in this case also was measured by the hay stone, and a weighing certificate given which set out both the weight by the imperial stone and the weight by the hay stone. After that the pursuer accepted payment according to the hay stone, and he not only did so without protest, but appeared quite satisfied with it, and according to the evidence of the witnesses present, offered the defender back a luck penny. That showed that the pursuer knew that he was dealing according to the hay stone. There was some confusion in the case as to the actual value of the hay, and it was very doubtful whether the price paid to the pursuer was a fair price according to the hay stone. That question, however, was not before him, as it seemed plainly proved that the hay was sold by the hay stone.

The next question was whether such a sale was legal under the new Act. The provisions of the Weights and Measures Act bearing on the subject were contained in three clauses. The 13th clause provided for the use of the imperial standard lb. This clause declared that it should be the only unit or standard measure of weight, from which all other weights and all measures having reference to weight should be ascertained. Then the 14th clause provided for the stone, the words being "the stone shall consist of 14 imperial standard lbs." Then came the 19th clause—the important one in this case—which laid down that every contract, bargain, sale, or dealing made for goods, wares, or merchandise should be made according to one of the imperial weights or measures mentioned in the Act, *or to some multiple or part thereof*, contracts not so made being declared void. Then, after some words immaterial to the present question, the clause proceeded to lay down the important provision that no local or customary *measures* shall be lawful. This brought out a very important distinction. It showed that no local or customary *measures* were to be reckoned lawful, but it said *nothing with regard to local or customary weights*, and the inference was that local and customary weights might be lawfully used, if they agreed with the provision laid down in the former part of the clause, viz. that they were imperial weights or some multiple or part thereof. Therefore, if a local weight was the multiple of an imperial weight, it seemed to be a lawful weight. The hay stone was a multiple of an imperial weight, viz. the imperial lb., which it contained twenty-two times. This view was confirmed by various considerations. In the first place, it agreed with what was laid down in the old statute (see *Jones* v. *Giles*, 1854, 23 L. J. Ex. 292), and he found that the provisions of the new statute were, on this point, almost the same as those of the old, for section 19 just said (with this difference, that it was more shortly and clearly expressed) the same as section 11 and section 21 of the 5th and 6th Will. IV. cap. 63. It seemed to him also to be plain that the view he was taking was what was intended by the statute, because the statute put weights in a different category from measures; and there was a reason for making them different, because so long as weights proceeded from multiples of the imperial lb., or other imperial weight, it was a mere matter of calculation, reducing from one denomination to another. Then again, he thought his view was what was intended by the statute from what occurred at a different part of it. He found that when the statute was being applied to Ireland a provision (§ 76) was made, which, had it been applicable to Scotland, would clearly have made the hay stone illegal. In the part of the Act applying to Ireland it was laid down that all contracts, bargains, sales, or dealings for any quantity of corn, grain, pulses, potatoes, hay, or straw shall be made by the following denominations of the imperial weight (the imperial denominations then being given). Then, the Act proceeded, "and not by any local or customary denomination of weight whatsoever." The intention of the Legislature was evidently to deal differently between Scotland and Ireland. What the reasons were for so doing he did not know, but apparently there had been reasons for making local denominations of weight illegal in Ireland, which were not regarded as applicable to England and Scotland; and the

importance of the matter was that it showed that the difference was made deliberately. He had come to the conclusion, therefore, that the use of the hay stone or 22-lb. parcel of hay was lawful, provided always that it was clear that the parties understood they were dealing by that stone and not by the ordinary stone, and provided also that both knew well the meaning of it. These points being certain, he thought the statute put the hay stone on a different footing from local measures, for instance, from such things as the Scottish acre or the Scottish pint. The result of the opinion to which he had arrived was that the pursuer had no further claim. There would, therefore, be absolvitor.

Act.—Prosser.——*Alt.*—Stewart.

Notes of English, American, and Colonial Cases.

COPYRIGHT IN ENGRAVINGS AND PRINTS.—*Registration of ownership—Right of action before plaintiffs' registration—Penalties—Pleading—Leave to amend at trial.*—The Act 25 & 26 Vict. c. 68 provides for registration of proprietorship and assignments of copyright in paintings, and enacts that no proprietor of any such copyright shall be entitled to the benefit of the Act until registration, and no action shall be sustainable, nor any penalty be recoverable, in respect of anything done before registration.—*Semble*, a registered proprietor cannot sue for offences under the Act committed when an earlier proprietor was on the register. *Dupuy* v. *Dilkes*, 48 L. J. Rep. Chanc. 682. In an action under the above Act seeking penalties, an injunction and other relief in respect of unlawful repetitions of a picture, the main object of the suit being the recovery of penalties :—*Held*, that the plaintiffs ought not to be permitted, upon the facts appearing at the trial, to raise a claim for relief under the same statute in respect of unlawful sales, that case not being made by their pleadings.—*Ibid.*

COPYRIGHT.—*Agreement to publish—Construction—Copyright Law Amendment Act—Forfeiture.*—A firm of publishers agreed to publish a work at their own risk, and divide the net profits with the authors :—*Held*, that the agreement was personal, and put an end to by a complete change in the members of the partnership. *Hole* v. *Bradbury*, 48 L. J. Rep. Chanc. 673. Sketches were drawn by an author on blocks, which were afterwards engraved. The cost of the blocks and of engraving was part of costs incurred at the publishers' risk, and deducted from gross profits, under an agreement to publish :—*Held*, that, on the termination of the agreement, the blocks belonged to the author.—*Ibid.* Books piratically printed before registration of the proprietor of the copyright do not become the property of the proprietor on registration.—*Ibid.*

PUBLIC HEALTH ACT, 1848.—*Public Health Act—Sewers—Side-entrance or man-hole—Compensation or purchase.*—In 1875 a local board, who had constructed a sewer under a public road, constructed on the land adjoining the road a side-entrance or man-hole to the sewer, and subsequently gave the owner of the land notice of their intention to construct two other man-holes. The landowner contended that the man-holes were "necessary works" within the 46th section of the Public Health Act, 1848, and the 19th section of the Public Health Act, 1875, and that the board could not construct them without first acquiring his land by purchase :—*Held*, that the man-holes were parts of a "sewer" within the 45th section of the Act of 1848, and the 16th section of the Act of 1875, and that the board had power to enter on the land and construct the man-holes without purchase, the only remedy of the landowner being compensation.—*Swanston* v. *Twickenham Local Board* (App.), 48 L. J. Rep. Chanc. 623.

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THE POST OFFICE AS AGENT FOR PARTIES CONTRACTING BY LETTER.

In the recent case of *The Household Fire and Carriage Accident Insurance Company (Limited) v. Grant* (English Law Reports, 4 Ex. D. 216), the Court of Appeal, in affirming the judgment of Mr. Justice Lopes, laid down propositions in regard to the extent of the agency which two of the learned judges held to be conferred on the post office by the posting of a letter which deserve careful consideration, as the consequences affect not merely commercial men, but all who propose to enter into a contract by the interchange of letters. The facts of this case may be shortly stated. The defendant on 30th September 1874 handed to the agent of the company an application for shares, which stated that he had paid to the company's banker a deposit of £5, and requested an allotment of 100 shares. He also agreed to pay the balance within twelve months of the date of allotment. The agent forwarded his application to the plaintiffs in London, and the secretary of the company on the 20th of October 1874 made out a letter of allotment in favour of the defendant, which was duly posted to him. The letter of allotment never reached the defendant. The defendant never paid the £5 mentioned in his application, but the plaintiffs being indebted to the defendant in the sum of £5 for commission, that sum was credited to him. In July 1875 and February 1876 small dividends were declared, which were credited to his account. On the company's going into liquidation the liquidator applied for the balance due on the shares, but the defendant declined to pay on the ground that he was not a shareholder. It was found by a jury that the letter of the 20th of October had been posted, but that the defendant had not received it.

The question was thus purely raised, whether when an offer has been made, the posting of a letter of acceptance makes a binding contract, though the letter of acceptance in point of fact has never been delivered to the offerer. Mr. Justice Lopes held that it does,

and his judgment was affirmed by Lord Justices Baggallay and Thesiger in the face of a vehement dissent from Lord Justice Bramwell. No difference can be suggested between the entering into the contract of partnership as in this case, and the entering into any other contract, and the decision of the point is thus of very wide application, and may be productive of very serious consequences. The view taken by the majority was founded partly on principle, partly on authority. The principle was thus stated by Thesiger, L. J.: "Whatever in abstract discussion may be said as to the legal notion of its being necessary in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless, therefore, a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment." "But on the other hand it is a principle of law as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance which only remains in the breast of the acceptor, without being actually, and by legal implication, communicated to the offerer, is no binding acceptance. How, then, are these elements of law to be harmonized in the case of contracts formed by correspondence through the post? I see no better mode than that of treating the post office as the agent of both parties." "But if the post office be such common agent, then it seems to me to follow that as soon as the letter of acceptance is delivered to the post office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hand of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance." In the matter of authority the majority relied on the case of *Dunlop* v. *Higgins*, in which the First Division of the Court of Session held that where an acceptance of an offer was duly posted, but owing to the state of the weather, which delayed the mail, was late in arriving, the acceptor was not liable for the delay, and the contract was binding. From this judgment Lord Justice Bramwell dissented, and argued that the case of *The British and American Telegraph Company* v. *Colson* (L. R. 6 Ex. 108), which, dealing with a precisely similar case, decided that there was no completed contract where the letter of acceptance did not arrive, was rightly so decided, and that in *Grant's* case the same result should have been arrived at.

In *Higgins* v. *Dunlop* (9 D. 1407), Lord President Boyle directed the jury that if the pursuers posted their acceptance of the offer in due time according to the usage of trade, they were not responsible for any casualties in the post office establishment. To this

direction the defenders excepted, but the First Division of the Court of Session held that the direction was correct. In doing so they guarded their opinions, so as only to deal with the facts proved. They did not decide that the mere posting of an acceptance completed the contracts, but only that in a case where the letter of acceptance ultimately reached the offerers, the posting of the letter in course of post prevented the offerers resiling from their offer. Thus Lord Mackenzie said, "If the answer was posted by the offeree in due time, he had the benefit of the acceptance. There are extreme cases supposable in which it might be necessary to admit exceptions to the general rule. In a case of extreme delay, which did not occur here, it might be said that the party making the offer might be entitled to rely that it was not accepted. There was nothing of that sort here, there was a mere ordinary casualty or delay at the post office." Lord Mackenzie did not deal with the case of non-arrival of the letter of acceptance, but it is clear that he construed the word "casualties" in the Lord President's direction as equivalent to "accidental delays," and that he would not have held non-delivery of the letter to be an ordinary casualty. Lord Fullerton again said that he made "a distinction between the binding effect of the acceptance when put into the post in barring the offerer from founding on the implication that it had been declined, and the absolute completion of the contract. The posting of the acceptance by the pursuers had most certainly the first effect. That having been done, there was no silence on their part, and consequently the pursuers were barred from arguing that the offer had been declined." But he would not say "that the mere fact of putting the letter of acceptance into the post office has the same effect as if it had not only been put into the post office, but had been actually delivered to the other party;" "that in the supposed case of a letter remaining undelivered for months or years, the mere fact of the letter being put into the post office completed the contract so as to keep the offerer bound by an acceptance which never reached him. In short, the First Division held that the only question was as to the effect of delay, and not as to the effect of absolute non-delivery. Had it been intended to lay down the general law which the English judges have deduced from it, the direction of the Lord President would have been that "the posting of the letter completed the contract," but such a ruling would have been disapproved by the judges before whom the bill of exceptions was argued. Lord Cottenham, in moving the dismissal of the appeal against the decision of the Court of Session, indicated no disapproval of the opinions expressed by the Scottish judges. He said that the question was "whether the fact of the letter being delayed, not by the act of the party sending it, but by an accident connected with the post—whether the party so putting the letter in on the right day is to lose the benefit which would have belonged to him if the letter had arrived in due course." Now the benefit

which the acceptor acquires by timeously posting his acceptance is, as stated by Lord Fullerton, to prevent the offerer saying that he had not accepted timeously; but the case did not require Lord Cottenham to decide whether the posting of an acceptance completed the contract. It is true that among the reasons stated by the Lord Chancellor is one to this effect, he refers to the case of the holder of a bill of exchange requiring to give notice of dishonour, and says "that if he puts the letter into the post at the right time it has been held sufficient." "Whether that letter is delivered or not is a matter quite immaterial, because the act of the post office is one for which he is not responsible." The same argument was put by Lord Fullerton, who drew the distinction above quoted. The distinction is obvious. In the case of notice of dishonour, no contract is being made and no liability created, but in order to preserve an existing claim the holder is bound to give notice in order to save himself from the objection of *laches*.

If, then, the case of *Dunlop* v. *Higgins* did not decide the question, the other authorities leave its determination doubtful. In *Duncan* v. *Topham* (8 C. B. 225) Justice Cresswell directed a jury that if a letter accepting an offer was posted and lost by the post office, the contract was complete. On the other hand, in *The British and American Telegraph Company* (*Limited*) v. *Colson* Chief Baron Kelly and Barons Pigott and Bramwell held that where the letter of acceptance did not arrive there was no contract, and in *Finncane's* case (17 W. R. 813) Lord Romilly arrived at the same conclusion. Lord Romilly, however, in *Hebb's* case (L. R. 4 Eq. 9) states the result of *Dunlop* v. *Higgins* to be that the posting of a letter of acceptance constitutes a binding contract, and that the reason is that the post office is the common agent of the parties. In the case he was dealing with there was no question as to the non-delivery of the letter of acceptance, and his statement of *Dunlop* v. *Higgins* cannot therefore be considered as indicating an opinion contrary to that which be expressed in *Hebb's* case, where the question did occur. In *Harris's* case (L. R. 7 Ch. 587) Lord Justice Mellish remarked that *Colson's* case was irreconcilable with *Dunlop* v. *Higgins*. There is thus in England a conflict of authorities, and though there the recent decision settles the point, unless a different view be taken by the House of Lords when presented for their decision, there is apparently no such weight of authority on either side as to lead a Scottish Court to adopt either view except upon its merits.

Apart, then, from authority, how ought this question to be decided? Is the view that the posting of a letter of acceptance timeously merely bars the offerer from objecting that there has been undue delay in accepting the correct one, or is the effect of posting such a letter to complete the contract there and then, although in point of fact the letter never reaches its destination? The solution of this question depends on considerations of legal principles of fact

and of expediency. A man may offer to enter into contracts either by advertisements addressed to the whole world or by letters addressed to individuals. In the latter case commercial custom has established the rule that the offeree must accept in course of post where no limit of time is mentioned, while in the former the terms of the advertisements and the circumstances of each case will determine within what limits of time a member of the public will be justified in holding that the offer still subsists. As a matter of legal principle the making of an offer gives to the offeree a *jus quæsitum*. He is entitled to accept it, but only within the limited time fixed by custom or the terms of the offer. The offerer may retract his offer before acceptance, but if the retraction be not communicated to the offeree before the latter has committed himself by doing some act which puts it out of his power to resile, the contract will be complete. Thus if A in London by letter offer to sell to B in Edinburgh 1000 tons of iron, B on receipt of the offer is entitled to accept it in course of post. If, however, before B has in point of fact put it out of his power to determine not to enter into the contract he receives a telegram withdrawing the offer, he can no longer accept, although he may have fully resolved to accept, and may have actually written the letter of acceptance. If, however, he has put the acceptance beyond his control by posting the letter or by giving it to a servant of the offerer, or by despatching the goods which A has offered to take in exchange, the offer can no longer be withdrawn, even though in point of fact when B posted his letter of acceptance A had already despatched his telegram or posted his letter withdrawing the offer. It is true that when B posts his letter of acceptance A has withdrawn his offer, and it is thus impossible that the minds of the parties should ever be brought together. This then points to the conclusion that the primary result of posting a letter of acceptance is to bar the offerer from saying that the offer has not been timeously accepted. It does not necessarily make the contract complete, because at the moment when the letter is posted the offerer may have withdrawn his offer. The acceptor does not know of the withdrawal and the offerer does not know of the acceptance, but the reason why the offerer is bound is that the offeree has not been timeously interpelled from doing an act which he cannot recall.

In the next place, the true position which the post office occupies towards the parties must be ascertained. This is a question of fact, which may be ascertained either from the consent of the parties or by implication from their actings. It is said that the post office is the common agent of the parties. It is difficult to see how this can be true, and if not true, it is merely a legal fiction, which is of no value as an explanation of an arbitrary rule. When A posts a letter addressed to B, the post office is his agent for its transmission to B; and when B posts his letter of acceptance addressed to A, the post office is his agent for its transmission to A; but because the

post office is first the agent of A and then the agent of B, it is simply absurd to say that he is their common agent. If, again, A handed his offer personally to B and B posts a letter of acceptance, the post office is clearly B's agent, but it is just as clearly not A's. When it is said that the post office is the common agent of both parties, it must have some duties to discharge to both. If the post office is B's agent for transmitting the letter to A, it has no duty to discharge towards A; but if, on the other hand, it is held to be A's agent, its only duty is towards A, viz. to receive the letter and to transmit it, but it has no duty towards B. But a common agent must have duties to discharge towards both principals, which are not exclusive of each other, and it seems impossible to suggest any duties which the post office discharges or can discharge which are not exclusive of one another. Again, in order to make the post office the agent of the receiver of the letter, the receiver must have done something to raise the implication that he has made the post office his agent not merely to bring to him letters which may be addressed to him, but also to receive them for him. Now this is an implication which has no facts to rest on. No receiver of a letter regards the post office as an agent to receive letters for him, and it is merely a legal fiction to say that any one has so appointed the post office. If, however, the post office be the common agent of the parties, two results must follow. In the first place, a principal has a right to forbid his agent any longer to act for him, and can forbid him to do any particular business. If the offerer is afraid that his withdrawal of his offer will not reach the offeree before the latter has posted his letter of acceptance, he must surely be allowed the option of withdrawing from his agent the power to receive the letter of acceptance for him, and the offeree could not insist on the offerer's agent acting contrary to his principal's instructions. In the second place, if the posting of a letter of acceptance completes the contract, posting of a letter of withdrawal must operate as intimation to the offeree, whose agent *ex hypothesi* the post office is, that the offer is withdrawn, and that he cannot subsequently accept, though in ignorance of his agent having received notice of the withdrawal of the offer. Both results are absurd, but are legitimate deductions from the fiction which the Court of Appeal has called to its aid.

It remains, in the last place, to consider the reasons of expediency of the proposed rule, that the posting of a letter of acceptance shall be held to complete a contract, although the offerer shall never hear that his offer has been accepted. On the one side, after an offer has been accepted, the acceptor may be exposed to the risk of finding that no contract has been made, because his letter has never been delivered. There is hardship in this, but it is a hardship which will seldom be felt in practice, for the acceptor of an offer will in the general case not be long of discovering that his letter has not reached. The silence of his correspondent will in ninety-nine

cases out of a hundred advertise him of the fact, because generally the offerer will have some communication to make in regard to the fulfilment of the contract. On the other, the risks to which the proposed rule will expose offerers are many and serious. Take the case of a man offering by advertisement to supply purchasers. He does not know how many answers he may receive, but the post office neglects to deliver some, and he may be liable in damages for non-fulfilment of contracts with persons of whom he never heard. In the common case of offers to do work the selected offerer is informed, but the others learn of their non-success from the absence of reply; but if after all a letter of acceptance has been posted but not delivered, an offerer who naturally concluded from the silence of the offeree that he had lost his hoped-for profit may find himself saddled with a substantial loss. The cases which have arisen in England show clearly where the real risk lies. When a man applies for shares in a company and receives no letter of allotment, he does not expect, where he has paid no deposit, to be told that no shares have been allotted him, and yet he may find at the interval of many years that he is subject to an unexpected liability for calls. The loss and hardship to the individual is great, the company suffers none in losing a single shareholder.

Considering, then, the decision in *The Household Fire Insurance Company* v. *Grant* from all these different points of view, one cannot but come to the conclusion that it is not merely inconsistent with sound principle, but certain to act injuriously.

PROSECUTION OF EMPLOYERS.

We do not here propose to discuss the subject which was so ably handled by Lord Shand, when he recently delivered the opening address of the Glasgow Juridical Society. It is to the liability of employers for the employment of imperfectly educated children that we desire to direct attention. In our Sheriff Court Reports for the month is printed a notice of the judgment given by Sheriff-Substitute Scott Moncrieff in the Sheriff Court of Banff. The case was the prosecution of an employer under section 5 of the Education Act, 1878; and it was proved that the child was under fourteen years of age, that there was no certificate of proficiency, that the employer had been warned by the parent that it was doubtful whether or not the child was of sufficient age. In these circumstances we should imagine there can be little doubt that the Sheriff did rightly in fining the employer, although, the prosecution being the first in the district, the fine was restricted to 5s., the maximum penalty under the Act being 40s. It cannot be too much insisted on that the duty of employers is to give a loyal and hearty support to the public legislation which has been passed to secure the

physical and mental development of children. The Education Act, 1878, does not, indeed, directly lay any positive duty on the employer in the matter, but the provisions of the 13th section, giving him a defence where in good faith and after due diligence he has nevertheless committed a breach of the statute, show what is expected from him; and the penalties to which he is liable for contraventions of the 5th and 6th sections make it his interest to act with the greatest caution. The case from Banffshire seems to have been that of employment by a farmer, to which, we understand, in this country no restrictions other than those contained in the Education Acts, 1872 and 1878, have as yet been applied, the Agricultural Gangs Act not extending to this country. Had the employment been in a factory the provisions of 41 and 42 Vict. c. 16, sec. 27 (the Factory and Workshop Act, 1878), relating to surgical certificates of fitness for employment, would have applied, and an inquiry into the child's age would have formed a necessary part of the certificate which it becomes the employer's duty to obtain.

It is not, however, with the Banffshire decision that we have to do, but with one or two very important matters of practice to which the Sheriff-Substitute alludes in his judgment. In the first place, we are glad to observe that the employer, although in the position of an accused person, was examined. No doubt there is a good deal of authority against the competency of this. After the passing of the Evidence Act, 1853 (16 and 17 Vict. c. 16, sec. 3), and before the passing of the Summary Procedure Act, 1864, the matter stood in this position. The Act of 1853, making parties admissible as witnesses, undoubtedly did not apply to persons charged in a criminal proceeding with offences punishable on summary conviction, "excepting in so far as the same may be at present competent by the law and practice of Scotland;" words which the late Sheriff Dickson declares (but without citing authority or giving argument) to qualify not the portion of the 3rd section with which we are dealing, but the previous enactments which it contains (Dickson on Evidence, ii. p. 1001). The editor of the second edition of Sheriff Dickson's work states in a learned note that in all the cases which had arisen in Scotland with reference to the meaning of this section of the Evidence Act, it had been held that the parties were inadmissible. Such were the prosecutions for penalties under the Tweed Fisheries Act, the Forbes Mackenzie Act, the Excise Acts. And in England, where about the same time a similar change was made in the law of evidence, although doubt existed in a case under the Smuggling Act, no doubt was felt that the party was not a competent witness in a prosecution for penalties under a Game Act. The general principle deduced from these cases is that where the proceeding is *ad vindictam publicam*, the rule of criminal procedure in this matter is applied, whatever be the general jurisdiction of the Court before which the proceeding is competently

brought, and whatever the precise nature of the penalty sought to be inflicted. Not much in this argument can be founded on the qualifying words used at the end of sec. 3 of 16 and 17 Vict. c. 16. Assuming that they refer to a previous practice of interrogating accused persons in Scotland, it is impossible to show that, except under special statutes, which would not make a general practice, any definite practice to that effect existed. No doubt there are traces of an extensive practice of referring the truth of the libel to the oath of the accused person; and Baron Hume seems to think (ii. 337) that this practice is not objectionable where the charge does not affect the life or liberty of the panel, and where it is not of a base or infamous character. But it would be difficult to apply a vague doctrine of this kind in favour of reference to oath to the support of a practice under modern public statutes of interrogating the accused as a witness in the ordinary manner.

Under the 23rd section of the Education Act, 1878, prosecutions for penalties under that Act are directed to proceed according to the Summary Procedure Act, 1864. The 28th section of the latter statute attempts a definition of those cases in which the jurisdiction conferred by Acts of Parliament authorizing convictions for offences and the recovery of penalties and the enforcement of orders by imprisonment should be held to be of a criminal nature. The test of a criminal jurisdiction is declared to be this consideration: "Where, in pursuance of a conviction or judgment upon such complaint, or as part of such conviction or judgment, the Court shall be required or shall be authorized to pronounce sentence of imprisonment against the respondent, or shall be authorized or required, in case of default of payment or recovery of a penalty or expenses, or in case of disobedience to their order, to grant warrant for the imprisonment of the respondent for a period limited to a time certain, at the expiration of which he shall be entitled to liberation." Now it is clear that the Education Act, 1878, does not itself authorize or require any of these things to be done. It simply authorizes the infliction of a penalty. On the other hand, its 2nd section declares that it shall be construed as one with the principal Act of 1872, "that the expression 'this Act' in the principal Act shall be construed to include this Act." The Act of 1872 authorizes punishment for fourteen days in prosecutions of parents for failure to educate, but it would be carrying construction rather far to hold that the vague declaration of sec. 2 of the Act of 1878 could be applied to prosecutions for illegal employment under that Act. Both Acts, however, declare that the proceedings for penalties are to be taken under the Summary Procedure Act, 1864. The 18th section of that Act authorizes a great variety of forms of conviction or judgment, which are contained in Schedule K to the Act annexed. The case applicable to the Education Act, 1878, is obviously No. 6, viz. "where the complaint is for the contravention of any Act of Parliament under which the accused is or shall be

liable to a penalty, and where no special provision is made for the recovery thereof, or for the substitution of a term of imprisonment in default of payment, . . . the judgment of the Court shall authorize execution by arrestment, poinding and sale, and imprisonment, unless recovery by imprisonment is excluded by the terms of the Act," and the warrant of imprisonment to be granted in pursuance of any such judgment may be in the form provided by the schedule, and shall authorize the detention of the respondent until liberated in due course of law. The proper form of conviction under the Act of 1878, therefore, seems to be a conviction of A B, adjudging him to pay the penalty, finding him liable in expenses, ordaining execution by arrestment, poinding, and also imprisonment, where there is power to imprison (*i.e.* where recovery by imprisonment is not excluded by the terms of the special Act). The warrant to imprison will not, of course, be granted until after the report by the poinding officer to the effect that the money has not been recovered by civil diligence, and it will then be for imprisonment until liberation in due course of law. This being so, it is quite clear that a proceeding under the Education Act, 1878, is a matter of civil jurisdiction in the sense of the 28th section of the Summary Procedure Act, 1864. Neither the special Act nor the incorporated provisions of the Summary Procedure Act bring such a proceeding within the definition of criminal which we have been considering.

But the 28th section of the Summary Procedure Act closes with this proviso: "Nothing contained in this Act shall be construed to affect the right of any party to proceedings taken under this Act to be examined as a witness therein, but such right shall remain as it would have been if this Act had not passed." Mr. Moncreiff, in his work on "Review in Criminal Cases," deduces from this proviso that the 28th section decides a case to be civil or criminal only for the purpose of review and for no other purpose, *e.g.* so as to determine whether a respondent can be examined or the concurrence of the public prosecutor is required. This may be the true interpretation of the Act, but it would certainly be an awkward and unintelligible arrangement. Why should a case be reviewed in the Supreme Criminal Court, unless it was a criminal case in the Inferior Court? The function of an Appellate Court depends to a large extent on the rules of procedure in the Courts which it presides over. There is no more important rule of procedure than that the respondent is not entitled to be examined. Whether it is a true interpretation of the Act or not depends not so much on the words of the proviso as on the purport of the section. The proviso merely reserves a right to be examined in cases which the section may be supposed for the first time to make criminal in respect of the penalties, direct or indirect, which are authorized. It does not say that a right to be examined or to examine may not emerge in cases theretofore considered criminal, but which the section for the first time declares to be of

civil jurisdiction. The true question on the meaning of the Act is whether the expression "nature of the jurisdiction" does not extend beyond the mere right of appeal to such important matters of procedure as the examination of the accused or the concurrence of the public prosecutor. If it does, then the right of the respondent to be examined in a prosecution under the Education Act, 1878, would be clear, because the Summary Procedure Act declares such a prosecution to be of civil jurisdiction. If it does not, then the Summary Procedure Act gives no help in deciding the question whether such a respondent can be examined, and we must fall back on general principles, unless the Education Act, 1878, contains any special provisions throwing light on the matter. The fine which it authorizes is no doubt imposed *in modum pœnæ*, and probably also *ad vindictam publicam;* but on the other hand, the statute apparently provides for a prosecution in which the public prosecutor is to take no part. This is so far the note or sign of a civil proceeding, but it must be remembered that the prosecution is at the instance of a person who so far represents the public, because he is appointed by a public representative body (viz. the School Board), or in other cases he is a public officer appointed by Government (viz. the Inspector or Sub-Inspector of Factories). The interests thus secured are no doubt those of the public, but still technically the concurrence of the public prosecutor is not required. To this consideration we may add the strong inference which is supplied by the case of *France* v. *Procurator-Fiscal of Inverness* (High Court, 29th June 1877), which was a prosecution of a parent under the Education Act, 1872, undoubtedly criminal in the sense of the Summary Procedure Act, and therefore properly coming to the High Court on appeal. Notwithstanding this, Lord Young, the case being decided on another point, expressed a very decided opinion: "I think the magistrate, as well as the School Board, ought to listen to the story of the parent;" and Lord Justice-Clerk Moncreiff, although reserving his opinion on the legal point, said that "it would certainly be very desirable that the parent's evidence should be taken." If it was competent to do this in a prosecution involving imprisonment, may it not be competently done in a prosecution involving only a pecuniary fine, to which the public prosecutor is not a party? This must, of course, be decided according to the present state of the law, not according to considerations of policy. But the policy of examining the accused, even in much more important cases than summary prosecutions, is being generally recognised; and we should beware of magnifying the obstacles which the law is sometimes supposed to place in the way of a right and reasonable decision. A great many statutes authorizing summary prosecutions declare that the testimony of the accused may not only be taken, but may be taken as sufficient for conviction. This may be used against the proposition that such examination is competent at common

law, but it indicates strongly that public opinion is in favour of such examination in summary prosecutions.

A second important and interesting matter of practice is alluded to in the judgment of Sheriff-Substitute Moncrieff. He raises, but does not decide, the question whether in a prosecution under sec. 5, sub-sec. 2, of the Education Act, 1878, the prosecutor must prove not merely that the child employed was under the statutory age, but that it had not the certificate of educational proficiency which exempts the employer from prosecution. Now, in the first place, it seems quite necessary that the prosecutor should in his libel negative this exemption. It is not a statutory offence to employ a child aged thirteen, you must add that there is no certificate. Even from this general class of children under fourteen without certificates, there are large exceptions made by this very section of the Act, *e.g.* those attending school under the Factory Acts. But the want of a certificate enters into the definition of the offence. The smart boy, who gets his certificate early, is entitled to work, though, we may hope, that smartness does not generally shorten the period spent at school. If the prosecutor is thus bound to negative the exemption, is he not bound to prove his case by proving that the exemption does not exist; and if the employer simply pleads not guilty, must he not be acquitted if no evidence is led with reference to the exemption. The question really resolves into one in the law of evidence whether the *onus* is so shifted to the respondent that, if he says nothing, the case may be held as proved against him. Such shiftings of the *onus* are recognised in criminal as well as civil proceedings. The presumption of innocence is no doubt strong, but, as Sheriff Moncrieff observes, two principles are opposed to the *onus* being continued on the prosecutor, viz. that in general one is not bound to prove a negative, and that the *factum probandum* here is one more peculiarly within the knowledge of the employer than of the prosecutor. The fact is one which probably could be determined by the School Inspector who granted the certificate, or by the School Board who retains the examination schedules, or it might be proved by the child, who will probably be ready to give evidence in favour of the employer. Apart from these general considerations there is a considerable body of practice in favour of the view that in such a case as we are considering the *onus* would be held to shift. The subject is somewhat meagrely dealt with by Mr. Dickson in his work on Evidence, 2nd edition, i. p. 9. It is more elaborately discussed in Paley on Summary Convictions, 6th edition, pp. 127-131. The author says, "With regard to such offences as are made penal only by the want of certain qualifications in the offender, or by the absence of certain exculpatory circumstances, a difficulty sometimes occurred in determining the degree of negative proof which ought to be required by the magistrate." In certain cases, especially under the Game Laws, it seems to have been held that evidence to negative the exemption must be given by the

prosecution, but this was probably due to the influence of a technical rule which required the magistrates to note in the conviction the evidence on which it proceeded. The doctrine was subsequently abandoned, wherever at least it seemed almost impossible for a witness to swear to the negative, because the fact lay almost wholly within the knowledge of the accused. And now, by the Procedure Act, 11 and 12 Vict. c. 43, sec. 14, commonly known as Jervis' Act, it is provided that if the information in any case negatives any exemption, exception, proviso, or condition, in the statute on which the same is framed, it shall not be necessary for the prosecutor to prove such a negative, but the defendant may prove the affirmative thereof in his defence, if he would have advantage of the same. It may be added here that the English law made a distinction, which does not at first sight appear reasonable, between the case where the exception appeared in the section of the statute which defined the offence and where it appeared in a separate section, not referring to the principal section. In the first case the prosecutor was bound to prove the whole offence, in the second the defendant was bound to bring himself within the proviso. This, of course, has been superseded by the statute; but in cases under the Licensing Acts the Court of Common Pleas had frequently refused to apply the principle of the statute, and this led to special declarations being inserted in these statutes. (See the judgment of Justice Blackburn in *Roberts* v. *Humphreys*, L. R. 8 Q. B. 483.) Turning now to Scottish law, it may, of course, be said that we have no such statute as Jervis' in this country, and if in England it required a statute to alter common law presumptions, the same may be the case here. It may also be said that the principle of that Act does not apply to what is not truly an exception or proviso, but an integral part of the definition of an offence. Whatever doubt there may be on these matters, we believe that there is nothing in the law of Scotland to prevent magistrates applying their own views of common sense to questions of evidence arising in summary prosecutions.

RECENT DECISIONS RELATING TO MASTERS AND SERVANTS.

DURING recent years a number of points of interest relating to masters and servants, employers and workmen, have been decided in Scotland. Perhaps the most important of these are illustrations of the doctrine of collaborateur; but as that subject has been dealt with separately in the *Journal*, we do not at present intend to refer to it.

Let us in the first instance call attention to the case of *Stevenson* v. *Adair* (July 5, 1872, 10 M. 919). That was the case of a minor

who had entered into an apprenticeship without the consent of his father. Such a contract Mr. Fraser (M. and S. 444) lays down to be null, unless there has been fraud on the part of the apprentice. *Stevenson's* case did not exactly decide this point, for it was an action by the master against a party who had become cautioner for the apprentice, and the Court held that whatever plea the principal might be able to maintain, the cautioner was clearly bound. The effect of such a contract of apprenticeship was however referred to, the Lord President observing: "I do not think that it can be affirmed that the contract is absolutely null and void. It may be that the contract cannot be enforced against the apprentice, and this on account of the peculiar position of the minor, who does not contract effectually without consent of his curators." And Lord Ardmillan, while declining to express any decided opinion, made the following remarks: "I must say I should have difficulty in holding that an indenture of service is not only voidable on proof of lesion, but *ipso facto* and absolutely void and null, in respect that it was entered into by a young man between seventeen and eighteen years of age, without his father's consent. I am aware that there are authorities to that effect applying generally to deeds and obligations undertaken by a minor. But the contract of indenture or agreement for apprenticeship or service, for three years, as in this case, is naturally appropriate to the age and position of a minor, and may perhaps be presumed to be for his benefit; and unless I am much mistaken, such agreements by young men of that age are very generally signed without the father's interposition. He may be absent or aged or careless, and, so far as I am aware, the want of his signature, if there be no lesion or injury to the minor, has not in the practice of Scotland been held to be necessarily and absolutely fatal to the agreement." That the cautioner in such a case would be liable is expressly laid down by Erskine, iii. 3, 64.

With reference to the period of service, when that has to be implied, while the case of *Scott* v. *M'Murdo* (February 4, 1879, 6 S. L. R. 301) seems to establish that a coachman will not be presumed to be a yearly servant, the cases of *Bentinck* v. *Macpherson* (February 26, 1869, 6 S. L. R. 376), or of *Cameron* v. *Fletcher* (January 9, 1872, 10 M. 301), decide the opposite with regard to gamekeepers. In the case of *Cameron*, however, a house had been taken by the gamekeeper for a year, apparently with the approval of the master. He had been improperly dismissed, and was awarded a sum of money by the Court, not, however, in name of the wages which he might have earned during the remainder of the year, but in that of damages. Upon the question of improper dismissal, the case of *Ross* v. *Pender* (January 8, 1874, 1 R. 352) is important. It is a very important decision for servants, for it seems to establish, in the first place, that where a servant is dismissed without good cause, it will not be deemed acquiescence in that dismissal

if he behaves quietly and does not immediately brandish the terrors of the law in the face of his master, but seeks to obtain other employment. The Lord President said, " However illegally he [the servant] was dismissed, it was his duty to go away quietly and afterwards claim damages, and not to resist his master's orders." In the second place, this case clearly recognises the respect to which a servant may hold himself to be entitled. The pursuer had been head keeper, and after his dismissal he was offered duty as keeper at an outlying shooting leased by his master. Although the wage was to be the same as that formerly paid, the Court held that such an offer was not one which he was bound to accept, or which barred his action of damages, as it lowered his position and injured his prospects. But from the opinions expressed it is clear that the judges were averse to the idea of considering as an element in estimating damages the loss of possible gratuities. " I would have great difficulty," said Lord Deas, " in holding that the master was bound to compensate a dismissed servant for a loss of that kind."

With regard to the claims which may be competently set off against a servant demanding wages, the case of *Pegler* v. *The Northern Agricultural Implement Company* (February 2, 1877, 4 R. 435) is a decision of some importance. The pursuer was engaged as the manager of a company at a fixed salary, and became bound to take over a certain number of shares at the price of £500, he, however, having it in his option to compel the defenders to repurchase half of these shares upon the termination of his engagement. Either party could terminate that engagement upon giving three months' notice in writing. After having served the company for some time the pursuer gave the necessary notice of his intention to leave their service, and at the same time called upon them to take over one-half of the shares. At the request of the defenders, however, he continued to act as manager for two months longer, during which no complaint was made against him; but when at the end of that time he brought an action for the proportion of his salary due and also the price of the shares, he was met with the plea that owing to the way in which he had kept their books, it was impossible to judge from them to what extent he stood indebted to the defenders, but that he was indebted to a certain extent. The question came to be whether this claim on their part was one which could be pleaded against a demand for wages. The Court were of opinion that it could not, and that the defenders were not entitled to a proof. The Lord President held that after the pursuer had given the written notice to the defenders, his claims became liquid when the day for the termination of the engagement arrived, because the defenders did not then make any objection, but asked him to continue in their service. The claim of the defenders, on the other hand, was illiquid. Lords Deas and Mure concurred, the former remarking, "The rule which prevents

illiquid claims being set off against liquid claims is founded in justice. It is intended to prevent parties from being kept out of their money by claims which may turn out to be altogether groundless, which may be put forward for the mere purpose of delay. The wages or salary of a servant is a strong instance of the reasonableness of this rule, for otherwise the servant might be indefinitely kept out of what is intended for his means of livelihood." Lord Shand was of a different opinion, holding it to be a hardship upon the defenders first to pay the salary and price of shares, and afterwards bringing this action. He quoted an opinion of the Lord President expressed in an earlier case to the effect that "if a servant brings a claim for wages, and the answer to that claim is an allegation of the servant's misconduct during the period of the service for which the wages were claimed, that would be a good answer in law to the demand *in toto*." Lord Shand did not think that the fact of the pursuer continuing in the service of the defenders after the termination of the engagement raised any speciality, for the case could not be taken on the footing "that if the pursuer had left the defenders' service at the date for which he gave notice, this defence would not have been stated. It is only reasonable to suppose the defenders would have made the investigations which disclosed the ground of defence at the date sooner or later, when the pursuer left their employment."

If a servant avails himself of the machinery of the Master and Servant Act, and brings a complaint for illegal dismissal, although such a complaint is of a criminal nature, and may be dealt with in a variety of ways under the statute by the Sheriff, it bars any subsequent civil action of damages founded upon the same facts. This was decided in the case of *Young* v. *Mitchells* (June 12, 1874, 1 R. 1011). The Sheriff had here found such a complaint not proven, and afterwards in an ordinary action relating to the same question, sustained the plea of *res judicata*, and the Court held that he had done rightly. The Lord President remarked: "It would be a matter much to be regretted did we feel ourselves constrained to hold otherwise. It would tend much to defeat the great object of the Master and Servant Act, which was to afford a means of trying conclusively as well as summarily such questions as this between masters and servants. Were I in any doubt about this matter otherwise, I should be confirmed in my opinion by the terms of the 18th section of the Act. It is intended to save the right of parties to take such questions to the ordinary Court of law, but then this is limited, and very naturally limited, by the addition of the words in any case when proceedings are not instituted under this Act. When proceedings are instituted under this Act the remedy resorted to is to be the sole remedy."

The Acts relating to employment have raised more than one point of interest recently. The case of *Kershaw* v. *Mitchell & Co.* (March 16, 1872, 2 Coup. 206) decided, in the first place, that the

Justiciary Court has jurisdiction in suspensions of convictions for breach of contract obtained under the Master and Servant Act, 1867, although the effect of that Act was in a measure to remove the criminal character of proceedings of this sort. In the second place, it decided that a complaint against a servant for failure to enter upon his contract of service was competent, even although the contract was not in writing. Mr. Fraser (Master and Servant, 737, 2nd ed.) states an opposite view which he successfully overcame as counsel for the respondent in *Kershaw's* case. The difficulty arises under the Act of 1867, and is thus pointed out by the Lord Justice-Clerk: "I find that under section 2nd of that Act the contract of service may be either in writing or by parole, and that section 3rd appears to undo what was done by section 2nd, for it provides that the Act shall only apply to the contracts of service included in the scheduled Acts, under which Acts only written contracts when the service had not been entered upon could form the ground of a complaint. But since we have one clause clear, and the other not so, I am of opinion that we must hold the meaning and intention of the Legislature to be disclosed in that which is clearly expressed, and therefore that a written contract was not necessary." The case of *Wilson* v. *Glasgow Tramway Co.* (June 22, 1878, 5 R. 981) raised the question, without deciding it, whether the power given by section 3 of that Act to rescind any contract between the employer and the workman would apply to arbitration clauses or awards under contracts of service already terminated. The case of *Couper & Sons* v. *Macfarlane* (Feb. 22, 1879, 6 R. 683) was an action at common law brought against a workman upon the ground that he had induced others "by means of threats, promises, misrepresentations, and payments of money" to leave the employment of the pursuers. This was held, if proved, to be a sufficient ground of liability.

Turning now to another matter, the liability of masters for injuries received by their servants in their employment, we observe that while recent decisions have more and more clearly established the doctrine of *collaborateur* in the law of Scotland, they have not been entirely unfavourable to the servants. They point to this, that it is only after every proper precaution has been taken by the master for the safety of his servants, and only when they are employed in the line of their ordinary business, that the master is entitled to meet a claim for damages with the plea of *collaborateur.* Lord Colonsay laid down in the well-known case of *Merry and Cuninghame* that "culpable negligence in supervision, if the master takes the supervision on himself, or, where he devolves it on others, the heedless selection of unskilful or incompetent persons for the duty, or the failure to provide or supply the means of providing proper machinery or materials, may furnish grounds of liability; and there may be other duties, varying according to the nature of the employment, wherein if the master fails he may be responsible." And

this is the view given effect to in *Stark* v. *M'Laren* (Nov. 2, 1871, 10 M. 31), where one of the employees in a chemical work was engaged by his master, under the manager of the chemical department, to remove a broken roof and got injured. Here, as neither workman nor manager was engaged in their proper work, the doctrine of *collaborateur* was held not to apply. And in the more recent case of *Robertson* v. *Brown* (May 17, 1876, 3 R. 652) the Lord President recognised a class of cases "where there is a duty on the one side on the part of the master to take precautions to protect his servant against risk, and no duty on the other side on the part of the servant to take any precautions for his own safety." In the case of *Gibb* v. *Crombie* (July 6, 1865, 2 R. 886), where there was an alleged breach of the Factory Acts, the injured workman being young, and the machinery improperly fenced, Lord Ormidale, dealing with the defence of contributory negligence, remarked, "Such a defence would require to be well supported by the facts before it could be entertained against the plain policy of the Factory Acts, which were intended to afford a protection to young persons against the carelessness and inexperience incidental to their age."

RECORD AND ISSUES.

THERE seems to be still some uncertainty with reference to the state of the law on this very important and practically interesting question, whether the terms of an issue adjusted for the trial of a cause can be controlled by reference to the record from which the issue was extracted. If, indeed, the practice and understanding of the Court of Session were alone to be consulted, this uncertainty would probably disappear. But there seem to be some traces in the House of Lords of a stubborn opinion which conflicts with that practice and understanding, and which must of course be taken into account in stating the actual position of the law. In the case of *Leys Masson & Co.* v. *Forbes* (Sept. 7, 1831, 5 W. and S. 384), better known as the *Don Fishery* case, it was, according to the rubric, "observed that it is incompetent to construe the issues by referring to the previous pleadings." The action was one brought for removal of a canal and dyke which the defenders had made for the supply of their spinning and bleaching mill on the river Don. The pursuer was a superior heritor owning salmon-fishings, and he was met by the preliminary defence that the mischief was not done by the defenders' dyke and canal, as there were farther up the stream, and below the pursuer's fishing, many similar obstructions to the passage of salmon, constructed by other persons, which obstructions, it was said, the pursuer ought first to remove. This defence was

overruled, and the following issues were then sent to trial: "Whether the said canal, cut as aforesaid" (*i.e.* in the admission, which gave a certain date), "is to the injury and damage of the pursuers, or of any or which of them, as proprietors of salmon-fishings in the said river?" and a precisely similar issue with reference to the dyke. At the trial the presiding judge, Lord Gillies, directed the jury that the question they had to consider under these issues was, "Is the dyke injurious to the pursuers' fishings in the actual state of the river and of the other dykes, and not whether it would be injurious to them if the other dykes were abolished or properly regulated." The pursuers' counsel, on the other hand, founding on what had previously occurred in the case, asked for a direction that the jury ought simply to consider the question whether the canal and dam-dyke were injurious to the fishings of the pursuers, without reference to the injury occasioned by the other obstructions in the river. The point was obviously whether or not actual damage must be proved. On a bill of exceptions the Second Division allowed the exception taken to Lord Gillies' direction, and appointed a new trial. In deciding to that effect the Lord Justice-Clerk Boyle (see 9 Sh. 933) goes entirely upon his personal knowledge of what had previously occurred in the case. The Lord Chief-Commissioner Adam defended the simple and general form of issue which had been employed, and which he contrasted with the multitudinous specific issues in use before 1817, sometimes as many as twenty-five in a single case. The other judges seem to have argued, from the form of pleadings and earlier interlocutors, that the issues must bear a certain construction. When the case went up on appeal, however, Lord Chancellor Brougham would not hear of any reference being made to the summons, condescendence, answers, or previous interlocutors. "It is too late for the Court to say, and it is past all doubt too late for the counsel to contend that your Lordships, or that the Court, or that Lord Gillies and the jury who tried the case, had anything to do with the condescendence and answers out of which, in point of fact no doubt, but accidentally, for the purpose of this argument, the issue arose that was so framed. Not only have they nothing to do with them, but it is too late to have to do with them, and they have no business to ask about them. The issue precludes them from saying a word upon what appears in the condescendence and answers, as much as the record of an Act, after the bill has become an Act, precludes any court of law dealing with an Act from looking back to the bill out of which that Act arose, or by referring to the speech of the honourable or noble person who may have introduced it, or to their conversation with an individual by which it may be made to appear, if you could get at it—which you never can—that the meaning was so and so, when the only question is, not what he meant, but what the law intends; in another sense of the word, what the law fixes as the legal meaning of the words which the Legislature, possibly on his instigation

possibly in spite of his efforts, may have thought fit to use in framing the law arising out of his bill or proposition. . . . The issue in this case has been framed by the Clerk of Court. He may have miscarried as much as you please; he may have put one fact in issue when he should have put another fact in issue; he may have made it an action for trespass instead of an action on the case; he may have made it an action for libel instead of for assault; he may have made the grossest blunder, but you are bound by the issue as it now stands." He then states his adherence to the principle that "the true way to plead is that the parties should each frame his portion of the record, under the fear arising from the penalty of a demurrer;" a principle which he seems to think was not much favoured in Scotland, where "irregularity, I may say, is only too regularly pursued; slovenliness is but too carefully pursued." In the case of *Leys Masson* v. *Forbes*, however, Lord Brougham and the other Law Lords came to the conclusion that the direction of Lord Gillies was wrong, as proceeding on a misconstruction of the issue without reference to record, and they therefore affirmed the judgment of the Court of Session.

In the celebrated case of *Househill Company* v. *Neilson* (2 Bell's App. 1; also in 4 D. 1187), where the main issue was whether a certain invention, as described in letters-patent, was not the original invention of Neilson, it seemed to be the opinion of the House of Lords that sec. 5 of 5 and 6 Will. IV. c. 83 (being the Patent Law Amendment Act), did not apply to Scotland, but that although a note of objections in terms of the statute did not require to be given in, the pursuer of a patent case in Scotland was sufficiently protected under the general issue by the provisions of the Judicature Act (6 Geo. IV. c. 120, secs. 6 and 8). It was argued there by Rutherfurd for the respondents that "with a view to prevent surprise and frequent motions for new trials, the statute required that the case to be proved should be averred on record. A distinction is taken in the statute between the grounds of action and defence and the facts and circumstances on which they are to be rested. And it is the duty of the judge, when evidence is tendered, to refer to the record to see whether the evidence comes within the case there made. The issue would have been unobjectionable, though the averment had been general; the only consequence would have been that the party could not have led evidence at all." And on the other side it was admitted by Lord Advocate M'Neill that "the general issue is to be qualified by the record, but the party leading evidence under it is only limited by not having made any averment at all on the subject attempted to be proved, or by having so limited his statement as necessarily to preclude evidence beyond it." And in the course of judgment Lord Campbell said, "I am, therefore, clearly of opinion that where an issue of this sort, which in the north is called a general issue, is granted, the learned judge at the trial is fully justified in looking, and ought to look, at the

record, and to confine both parties to the facts and circumstances which are therein alleged."

In *Fairley* v. *O'Halloran* (November 21, 1855, 18 D. 78) an action was brought against a shipowner for damages for breach of contract to ship goods sent by the pursuer. The pursuer proposed a general issue, but the defender objected that the record mentioned only failure to ship particular goods, and that, according to a report of what passed in the House of Lords in *Morgan* v. *Morris*, the pursuer would not be confined to this in his proof. The Court there said, "The practical result of what is now contended for would be that in every case the record must be referred to as embodied in the issue, which would be totally inconsistent with all our practice; and if at the trial the pursuer of an issue is not restrained by the record as to the facts or medium by which he is to support them, I do not see what would be the use of the record, or how a judge could deal with evidence on the ground of surprise." The reference to *Morgan* v. *Morris* here is to the first discussion of that remarkable case in the House of Lords under date July 26, 1855, which resulted in a judgment that the verdict on the first trial was bad from uncertainty. The subject under notice is not referred to, nor is it in any way involved, in that judgment, but according to Mr. Paterson's interesting report of the argument, the following conversation took place:—Respondent's counsel, Solicitor-General Bethell and Dean of Faculty Inglis: "The sole case which the appellants made in their condescendence was that their father was uncle of the deceased, and the jury gave a proper answer to that by saying that they had not proved that fact." Lord Chancellor Cranworth: "But surely the jury were bound to say yes or no to the issue; for instance, to say, (1) Alexander is not heir at law; (2) he and James are not next of kin. An issue being once directed, all we can look to is, whether that issue is properly answered by the verdict. What does it matter how the pursuers make out their case, provided they establish the affirmative of the issue?" Counsel: "The appellants could not prove their case in any other way than what they stated it to be in their condescendence." Lord Brougham: "But the jury can't look at the record, they can't look beyond the issues." Lord St. Leonards: "I understand the law of Scotland to be this, that if you state in your condescendence a particular mode of making out your case, and an issue is directed, then you are restricted at the trial to that particular mode of proving the issue." Counsel: "That is a correct view of the procedure. The pleadings control the issue. The province of the condescendence is to define with some particularity the proposed mode of proof, as was explained in *Neilson* v. *Househill Coal Company*." Lord Chancellor: "But that was a patent case. There is a special statute which requires full particulars to be given, which shows that that is an exception to the general rule." Counsel: "That statute, however, does not apply to Scotland, and for the very reason that the

Scottish condescendence supplied the particulars without the aid of any statute." Lord Chancellor: "For my part I think the strict way of looking at the issues alone is the best. It may be a very good reason for the Court directing issues so framed that they can be proved only in the way indicated in the condescendence, but when once the issue is directed, I think neither the judge nor the jury has anything to do with the record." Lord St. Leonards: "Has the judge at the trial the record before him?" Counsel: "Yes, the record is before the judge and the issue before the jury, and if the pursuer attempts to prove the case in any other way than that set forth in the condescendence, the judge interferes to prevent it." Lord St. Leonards: "Is this statement of the practice below admitted on the other side?" Lord Advocate Moncreiff: "It may be that the record is *de facto* before the judge at the trial, but we contend it is an irregular practice, and not warranted by the statute. The issue is the sole thing to be looked to at the trial." In the reply for the appellant reference was made to the *Don Fishery* case, and the Lord Chancellor observed: "It seems to be that trials would be endless if we were to be guided by anything but the issue in looking at the verdict." This subject is also noticed in a subsequent report of *Morgan* v. *Morris* (3 M'L. 323), where Lord Chancellor Chelmsford expressed his unqualified assent to the opinion of Lord Brougham in *Leys Masson & Co.* v. *Forbes*: "It is said that the issues which were general as to Alexander being the heir and as to Alexander and James being the next of kin, were made specific and limited to a precise proof of heirship and of next of kin by the condescendence, which alleged that James Morgan, the father of the claimants, was brother-german of Thomas Morgan, who was father of John Morgan, the deceased. But it is most important always to bear in mind that the question to be tried is involved in the issues and in these alone, and that you are not at liberty to go out of them for the purpose either of limiting the inquiry or of defining with more particularity the points to be determined by the jury." It may be added that this observation was made in presence of Lord Brougham, who did not dissent.

In *Kerr* v. *Magistrates of Stirling* (21 D. 169) an action of damages was brought against the magistrates in respect of their failure properly to fence a certain path. In arguing that the public character of the path, and the way in which it was dangerous, should be put in issue, the counsel for the defender (Moncreiff, D. F.) said that "it was doubly necessary to be careful in consequence of the views recently expressed in the House of Lords as to issues not being controlled by the record." The Lord President M'Neill observed: "A doctrine to that effect is said to have been enunciated in some *dicta*, I believe *obiter dicta*, but I am not aware that it has ever obtained the authority of a judgment of the House of Lords. If the doctrine referred to had reference to such an issue

as this, framed in general terms for the trial of a cause, I venture to think that it is opposed to the whole course of our practice, and to the principle and purpose of our system of closed records based on statutory authority. It also appears to be directly opposed to a very authoritative judgment of the House of Lords on this point pronounced by Lord Lyndhurst, Lord Brougham, and Lord Campbell. In the *Househill* case, where the point presented itself for direct decision, the present Chief-Justice of England in particular spoke of our practice in this matter as much more salutary than the opposite practice which prevailed in England, and said that he knew that the House of Lords most highly approved of it, and would most carefully guard it." And in these observations Lords Ivory, Curriehill, and Deas concurred.

The next case is *Brackenbury* v. *Souter* (Dec. 21, 1860, 23 D. 212). It was a declarator of pedigree and reduction of a competing title. The pursuer proposed general issues whether she was lawful heir in general and lawful heir in special of the deceased. The defender objected that under such an issue the pursuer might endeavour to establish, and might perhaps be permitted to establish, a pedigree not identical with that set forth; and the defender therefore proposed to put in issue the special line of descent averred by the pursuer. The First Division of the Court, consisting of the same judges as in *Kerr's* case, approved of the special issue. One reason given for this was the convenience of statement to the jury, but another, and probably stronger one, was that the Court had by this time heard what was said by Lord Chelmsford in *Morgan* v. *Morris*, which the Lord President admitted to amount to this, "when once an issue is adjusted, the record is no longer to be looked at in limiting that issue." The observations of Lord Brougham in *M'Lean's* case are also referred to, but the case is held not to be in point. The Court express the hope that in some future case the House of Lords may explain that they did not intend to say what at least Lord Chelmsford said in *Morgan* v. *Morris;* the ground taken being precisely that adopted in *Kerr's* case. The special issue is given very much on this principle that, whatever the House of Lords may say about records, we must at least preserve our process law of notice. As the Lord President says, "This much at least is clear, that a party coming into Court with a particular pedigree, on which the record is closed, and not only seeking to reduce another party's title, but bringing her own claim to be heir in special, would not be entitled to go into another pedigree in order to establish her right in some other way; else what would be the use of a record?"

In *Mackintosh* v. *Smith* (2 M'Ph. 1261) the issue was whether for a certain period the defenders wrongfully and illegally detained the pursuer in a madhouse. At the trial certain questions were allowed to be put to the pursuer concerning specific instances of conduct twelve years before the date of trial of which no notice was

given on record. The pursuer excepted to this, but the exception was disallowed by the First Division. The view taken there that the pursuer's sanity was being inquired to, that he had himself set up his sanity for a long period, that the various facts of insane conduct did not require to be set forth in the record, and therefore there could be no surprise in cross-examining as was done at the trial. The judge (Lord Kinloch) had further directed the jury that under the general issue stated they could not consider the question whether, assuming the pursuer to have been rightly detained in an asylum, there was any illegality in the *mode of his confinement*; as, for example, by breach of statutory regulations made with reference to the use of cells, the keeping of registers. Here again the Court (Lord President M'Neill, Lords Curriehill, Deas, and Ardmillan) were of opinion that breach of the regulations and illegality of mode of confinement could not be gone into at the trial, because, though perhaps relevant to the issue, they were not within the record, and no special damage was said to follow from such illegal mode of confinement. The Lord President said: "That is a matter on which I myself have no doubt at all. I have no doubt that when the issue which we call a general issue is sent to trial, it is necessarily controlled by the record. What we call special issues bring up certain questions which speak for themselves, these questions must be tried and discussed when they are plainly put, whether the record is applicable to them, yea or nay, because the issue is one that has been extracted by the Court from the record, and into which the Court have put that which at the time of framing the issue the Court regarded as the point to be investigated. But when an issue is made in different terms, what we call a general issue, it is made for the very purpose of not embracing particularities; it is made for the purpose of comprehending everything that is within the action and record, but nothing that is without the action and record." He then points out that under the issue of deed or no deed, such widely different questions as blindness, incapacity, fraud, and circumvention might be tried, but not unless notice of each was given on record. The case of *Leys Masson & Co.* he endeavours to distinguish as a case in which the attempt was, not to go beyond the record, but to change the issue altogether; and the observations of Lord Brougham in that case "were made without much regard to our system of records." The doctrine of Lord Brougham, he says, was this: "Once you extract the particular matter out of the record, you cannot go back to see if it was rightly extracted, you must try it *valeat quantum*, and get some other remedy, if necessary." The opinion of Lord Chelmsford in *Morgan* v. *Morris* the Lord President seeks to weaken, by observing that Lord Campbell's opinion in the *Hillhouse Coal Company* was not brought before Lord Chelmsford. But, as we have already pointed out, Lord Brougham, who took part in the *Hillhouse Coal Company*, was also present at the judgment in *Morgan* v. *Morris*.

He further cites the opinion of Chief-Commissioner Adam (Adam on Jury Trial, pp. 31-35), that "additional security against surprise would admit of the safe extension of the general issue to many actions to which it has not yet been applied, and would secure its safe continuance;" and he observes that the Judicature Act required that all facts to be founded on should be set forth on record. These views were acquiesced in by all the judges of the First Division. We may observe in passing that according to sec. 1 of the Court of Session Act, 1850 (13 and 14 Vict. c. 36), "the allegations in fact which form the ground of action shall be set forth in an articulate condescendence, together with a note of the pursuer's pleas in law," which are to be held as part of the summons. Formerly they were in the summons. The Judicature Act, 1825 (6 Geo. IV. c. 120, sec. 6), gave power to the Lord Ordinary to dismiss or to give interim decree against the pursuer, where the grounds of action set forth in the summons did not appear to be in terms sufficiently clear and positive, or the conclusion not regularly or legally deduced. According to sec. 7, if the Lord Ordinary were satisfied on these points, and that no further disclosure of facts or pleas is necessary for the due preparation of the cause for trial, he should require the parties to state positively whether they are willing to hold the summons and defences as containing their full and final statement of facts and pleas in law. If they do not agree, or the Lord Ordinary thinks fit, he is then, under sec. 8, to order condescendences setting forth without argument the facts which the parties offer to aver and prove in support of the summons and defences; and in these condescendences the parties set forth in substantive propositions and distinct heads and articles all facts and circumstances pertinent to the cause of action or to the defence, and which they respectively allege and offer to prove; and they are also to produce all writings founded on. The record thus ascertained to exhaust the whole disputable matter in law and facts between the parties, precludes them from making any new averment or pleading any other plea in law. These sections of the Judicature Act were all repealed in 1875, being regarded as superseded by subsequent Acts. But it was while they were in vigour that the law relating to issues received its first development. In *Mackintosh* v. *Smith* the House of Lords did not find it necessary to pronounce any judgment on the question of controlling the issue by the record, because they thought the natural construction of the issue to be that put on it by Lord Kinloch, and contended for the defenders in the case. But Lord Chelmsford took occasion to repeat in substance the views which he had indicated in *Morgan* v. *Morris*.

In considering, on a view of these authorities, what is the actual state of the law on this practically interesting subject, two things in nature quite different must be kept separate: first, whether in construing an issue where its terms are said to be ambiguous, it is competent to refer to the pleadings and prior interlocutors and

judgments in the case; second, whether, where a general issue is allowed, evidence undoubtedly relevant to that issue is to be rejected, because it has not been indicated on record, and the party against whom it is offered would therefore be surprised. It may be held as settled from the cases cited, and from the reason of the thing, that issues must have a fixed meaning, and therefore that they cannot be construed by anything outside the issue, as was attempted in the *Don Fishery* case. We say this, having fully in view what has been said in various cases by Chief-Commissioner Adam. In *Bertrams* v. *Barry* (1 Murr. 347) he said, "If there had been any ambiguity in the issue, then we might have gone to the prior proceedings to explain it, but when the issue is clear we must be ruled by it." It was there attempted to add something to the quality of wine contracted for as set forth in issue. Again, in *Leven* v. *Young* (1 Murr. 355) he said, "If they [the summons and condescendence] were necessary to explain the issue, he would have no difficulty in receiving them, but if they were intended to prove facts, he was prepared to state why he could not receive them as evidence." Again, in *Scruton* v. *Catto* (3 Murr. 61) he said, "When any doubt arises as to the meaning of an issue, we must look into the summons, defences, condescendences, and answers, to ascertain the fact and nature of the averment from which the issue was drawn; and in this case we have had recourse to the summons to construe the issue." No doubt the *Don Fishery* case and also *Lord Fife's* case (as to which see Chief-Commissioner Adam, 1 Murr. 137; and Adam on Jury Trial, App. No. VII.) were cases in which the issue was not ambiguous, although different constructions were contended for. But where a case of ambiguity arises, surely the party interested in the verdict must suffer. But, as regards the second question, it seems to be doubtful how far the Law Lords, who have expressed very strong opinions upon it, have intended these opinions to go, or how far they understood that the law of surprise in Scotland depended upon the structure of the record, which, as Chief-Commissioner Adam informs us, rendered possible the introduction of the general issue. There is of course a law of surprise in England. Now, indeed, the 18th rule in Schedule I. annexed to the Judicature Act, 1875, very much resembles the provisions of the 7th and 8th sections of the Scottish Judicature Act. Therefore the Law Lords do not mean by their opinions to destroy a reference to the record so far as this is necessary for a protection against surprise. The reconciliation of the conflicting authorities will probably be found in the distinction between causes of action, which must be limited by the record, and facts alleged in evidence of causes of action, a specification of which may well be called for in the consideration of relevancy, but which may probably be varied to a considerable extent in the course of a proof under a general issue. In fact the record controls the general issue, but only to the extent of preventing surprise.

THE NEW PUBLIC PROSECUTOR FOR ENGLAND.

AT last England is to have an officer to institute, undertake, or carry on criminal proceedings in all Courts, with the exception of Police Courts, "and to give such advice and assistance to chief officers of police, clerks to justices, and other persons, whether officers or not, concerned in any criminal proceeding respecting the conduct of that proceeding." The statute, which has introduced what cannot be considered after our Scottish experience but a very beneficial change, passed on 3rd July 1879, and is 42 and 43 Vict. c. 22, shortly intituled "The Prosecution of Offences Act, 1879."

This new officer, although called "the Director of Public Prosecutions," is to be under the superintendence of the Attorney-General, who, with the approval of the Lord Chancellor and a Secretary of State, is to frame regulations to be laid before both Houses of Parliament, which shall not be finally approved "until the draft has lain before each House of Parliament for not less than forty days upon which such House has sat." The Act will not in consequence come in all probability into operation until April or May 1880.

The Director is to be appointed by the Secretary of State, and must be either a barrister-at-law or a solicitor of the Supreme Court in actual practice, and of not less standing than ten years. After appointment he is not to be permitted directly or indirectly to practise except in the discharge of his duties as Director. His salary is to be fixed by the Secretary of State with consent of the Treasury, but is not to exceed £2000 per annum. Nothing is said as to the duration of the appointment.

The Director is not supposed to be equal to the selection of those on whose assistance he has to depend. The Secretary of State is to have the appointment of the Director's assistants and is to assign them their duties, while the Attorney-General, with the approval of the Secretary of State, is to appoint the Director's clerks, messengers, and servants, and to assign them their duties. This is not the best way to secure harmonious or effective action in the new office, and it betrays the centralizing and despotic tendencies of the present Home Secretary quite as much as the Sheriff Court Acts of 1870 and 1877, and the Lord Clerk-Register Act of the present session (42 and 43 Vict. c. 44).

These assistants, who may be either barristers or solicitors of the Supreme Court, must have been at the time of appointment in actual practice and of not less standing than seven years. They are to have assigned them areas or districts, to be fixed by the Attorney-General, with the approval of the Lord Chancellor and a Secretary of State. "No Assistant Director of Public Prosecutions shall be appointed for any longer term than seven years; but any person vacating his office by reason of this provision may be re-

appointed." The Assistant Directors, equally with the Director, are to be debarred from directly or indirectly practising their profession except in the discharge of duty under the Act. It remains to be seen how this embargo will operate as regards officers having a temporary and not a permanent appointment.

The duties of the Director and his assistants are to be confined to prosecuting and advising as to prosecutions. They are not to have anything to do with investigations into deaths, fires, and all those matters with which the Sheriff and his Procurator-Fiscal are charged in Scotland.

Justices of the Peace and Coroners are taken bound after notice by the Director to give him every assistance in prosecuting criminals. If the Director once interferes, he is, on abandonment or neglect to prosecute, to be liable at the instance of any person having the right to institute proceedings, and on such persons showing good cause, to be called before any judge of the High Court of Justice to defend his conduct, and the judge "may give such directions as to the mode in which such proceedings shall be continued by such person so applying, or by the said Director of Public Prosecutions, as to such judge shall appear right."

The Act thus summarized seems a small instalment of what criminal justice requires: still it introduces into England machinery capable of expansion into a system somewhat commensurate with the necessities of so great a country.

THE LORD CHIEF JUSTICE AND THE LAW OF EVIDENCE RELATING TO STATEMENTS OF MURDERED PERSONS.

A CASE of murder tried before the Lord Chief Justice, at Norwich, on Thursday last, has created much interest, and during the past week been the subject of much discussion, in respect of the ruling of the judge as to the inadmissibility of a statement made by the murdered person just after the act causing death was done and a short time before death. The Lord Chief Justice has had so much experience in criminal cases, and is so accomplished a master of the varied intricacies of the criminal law and procedure, that the objections taken to his ruling would hardly have given rise to so much comment, but for the fact that those who have questioned its accuracy have adduced strong arguments in support of this objection, and one of them is a gentleman well known as the author of a standard work on the Law of Evidence. We propose, on account of the interest of the subject, to put, briefly summarized, before our readers the leading cases which have been decided upon the point, so that they may be in a position to estimate at a glance the merits of the discussion. But first of all we shall state briefly

the facts of the present case, and the reasons given by the judge for rejecting the evidence proposed to be put in by the prosecution. The prisoner, a stonemason, and a married man, lived in the Woodbridge Road, Ipswich, and the deceased, a widow, was a laundress, living about half a mile off in the same road. The prisoner had been a friend of the husband, and had, during his illness, looked after his affairs for him, and after his death continued to look after the horse which the deceased used in her business, being allowed in return the use of it when not required by her, and permission to keep pigs at her place. It appeared that he wished her to let him have her horse and cart, which she however declined to do. He used to come twice a day to the house, and they called each other "Harry" and "Eliza." A witness spoke to several quarrels having taken place between prisoner and the deceased before the fatal day, which they afterwards made up, and stated that on one occasion there was a quarrel on account of the prisoner's wanting the horse and cart and deceased refusing to let him have it, and that on the day previous to the murder, the 7th July, the deceased had sent away the pigs' food from her house. On the morning of the murder prisoner came in at half-past seven, the deceased being then at work washing, and her assistant, Mrs. Rodwell, being also there. The deceased went into the front room, prisoner followed her, and the door was shut. About ten minutes afterwards he came out of the room into the back room, where he went to the cupboard and took out a small bottle, with which he went out, and, as appeared, got some rum in it. Mrs. Rodwell went into the front room, and found deceased in a faint on the floor with her head on a hassock, as if it had been put by some one under her head. Deceased spoke and said, "Oh dear, how bad I feel!" Mrs. Rodwell then went back to her work, and in about three or four minutes she was in the drying-ground, where another assistant was, who said something to her, in consequence of which she went back to the house. On her way back she saw deceased coming out of the gate bleeding very much from the throat, and seeming very much frightened. Deceased said something to the witness, which, however, was excluded, and so was not stated, though its effect may be surmised from what the Lord Chief Justice said, that "if admitted, it might have a fatal effect." The prosecution tendered it in evidence, but the Lord Chief Justice in holding it not admissible said, "Anything that was uttered at the time—that is, that the woman uttered an exclamation, or pointed in a certain direction while the act was being done, or that she screamed, would be admissible as part of the *res gestæ*, but this was something said after all was over, and as it was said in the absence of the prisoner, was not admissible." He also observed "that he regretted that by the law of England any statement made should not be admissible." The case accordingly went to the jury with this statement excluded, but nevertheless they found the prisoner guilty.

Now, it has been contended that, upon two grounds, the statement which the Lord Chief Justice ruled to be inadmissible in evidence was admissible. The first is that the statement comes within the rule which (an exception to the rule rejecting hearsay evidence) under certain circumstances allows the admission of dying declarations. The general principle on which this species of evidence is admitted was stated in *Woodcock's* case, by Lord Chief Baron Eyre, to be this: "That such declarations are made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a court of justice." But in order to make such a declaration admissible it is essential, and is a preliminary fact to be proved by the party offering it in evidence, that it was made under a sense of impending death. Any hope of recovery, however slight, existing in the mind at the time the declaration was made will render it inadmissible; and it is well settled that it ought not to be left to the jury to say whether the deceased thought he was dying or not; but that that must be decided by the judge before he receives the evidence (*John's* case, 1 East, P. C. 357). Consequently, whether a particular dying statement is admissible as being within the above rule, must depend upon the circumstances of each individual case, and upon the judge who has to decide upon its admissibility. When he has exercised his discretion and rejected it, that discretion can hardly be questioned upon a bare report of the trial which may not contain all the facts upon which the exercise of it was governed. The first ground of objection to the Lord Chief Justice's ruling may, therefore, be put aside at once, inasmuch as he in the exercise of his lawful discretion was of opinion that upon the facts the declaration of the deceased was not made under such circumstances as to bring it within the rule as to dying declarations. There remains, then, the second ground of objection to the ruling, and that is, that the statement was part of the *res gestæ*, and so admissible. Now, although the expression *res gestæ* is one that often conveys little meaning, and the argument put forward for the admissibility of a piece of evidence—that it forms part of the *res gestæ*—amounts often to nothing but mere words, it must be confessed that in the present case that argument has a considerable show of strength. The principal cases which have been put forward to show its applicability to the present case are *R.* v. *Foster* (6 C. & P. 325), and *Thomson et Ux* v. *Trevanion* (Skin. 402). In the former case, which was tried before three judges in 1834, the prisoner was charged with manslaughter in killing A by driving a cabriolet over him. B saw the cabriolet drive by, but did not see the accident, and immediately afterwards on hearing A groan went up

to him, when A made a statement as to how the accident happened. It was held that this statement was receivable in evidence on the trial of the prisoner for the manslaughter of A. In the latter case, which was an action by husband and wife for wounding the wife, Lord Chief Justice Holt allowed what the wife said immediately after the hurt received, and before she had time to devise anything for her own advantage, to be received in evidence as part of the *res gestæ*.

We have not seen any English murder case cited in support where a similar statement has been held admissible, and we are not aware of there being any. An Irish case is that of *Reg.* v. *Hugh Lunny* (6 Cox C. C. 477), tried in 1852 before Monahan, C.J., on the Irish Home Circuit. The deceased had died from the effects of a wound on his head inflicted by a stick. A girl in the neighbourhood had heard a cry, and coming out had found the deceased standing with his cap in his hand and apparently weak and injured. The deceased did not survive more than a few hours. It was objected on prisoner's behalf that it could only be as a dying declaration that what the prisoner said to the witness could be evidence, and they had not shown that at this time the deceased knew he was dying. His Lordship ruled that what the deceased then said was evidence as part of the *res gestæ*, and upon the question being put the witness said, "I asked him what was the matter with him. He said he was robbed by the man who walked with him from the cross roads." The prisoner was convicted of murder. It would be difficult to find a more parallel case to the one under discussion than that we have just cited, and the conclusion to be derived from the two is that if Monahan, C.J., was right in the one case the Lord Chief Justice is wrong in this, and *vice versa*. An American case of a similar kind is that of *The Commonwealth* v. *M'Pike* (3 Cush. 181). There it was held that the declaration of a person who is wounded and bleeding that the defendant has stabbed her, made immediately after the occurrence, though with such an interval of time as to allow her to go from her own room upstairs into another room, is admissible in evidence after her death as a part of the *res gestæ*. This case furnishes an *à fortiori* argument against the ruling of the Lord Chief Justice. On the other hand it must not be forgotten that it is extremely difficult to lay down particularly any rules for determining whether such statements come within the *res gestæ*. Apart from the Irish case, which was only a circuit case, the English cases where such statements have been admitted, were not cases involving the punishment of death. If they had been it is probable that the judges would have discussed the admissibility of the statements at much greater length than the reports represent them to have done. Further, it must be remembered that the rule is an exception to the general rule as to hearsay, and it is not always advisable to extend such exceptions too far. Mr. Greaves mentions a striking

instance of the danger of trusting to statements made after a mortal wound has been inflicted as having been tried at Gloucester Summer Assizes, 1842. The prisoner, one Macarthy, was indicted for murder, and the deceased had been stabbed by the prisoner whilst he was pursuing him in order to give him into custody for an assault, and the deceased expressly stated that the prisoner had knocked him down, but two companions of the deceased, who were present during the whole time, distinctly proved that the deceased was not knocked down at all. This is, of course, no argument against the rule as to admitting statements forming part of the *res gestæ*, but it is one to cause judges to exercise with caution the discretion they are allowed to exercise in admitting such statements upon trial for murder.—*The Law Times*, Nov. 22.

Correspondence.

ACCURACY ABOUT ADJUDICATIONS.

(To the Editor of the Journal of Jurisprudence.)

SIR,—I have read with care and interest Professor Mackay's letter in your last number, in reply to one from myself in the previous number. The cause of my writing to you was that Mr. Mackay had called in question a statement of mine to the effect that "all adjudications in use were at one time [before 1672] competent in the Sheriff Court." Mr. Mackay now explains that he had misunderstood my meaning. It appears that he read my words as if I had said that "all adjudications were in use before 1672, and were then competent in the Sheriff Court"—a statement which, had I made it, he would have been right in saying was inaccurate. The fact that a gentleman of Mr. Mackay's intelligence has misunderstood my meaning shows that the statement cannot have been so clear as it might have been, but I cannot help thinking that it was clear enough. Mr. Mackay gives as his reason for misunderstanding it that he could not suppose that I intended to except "adjudications for debt" from the statement. In this view, however, he was correct, and when he saw so much of my meaning, I cannot make out why he failed to see the whole. I certainly included those adjudications, to the effect of saying that if they were competent before 1672, they were as competent in the Sheriff Court as they were in the Court of Session.

On the question whether "adjudications for debt" were competent anywhere before 1672, Mr. Mackay throws no additional light. I gave some reasons for venturing to say that they probably were competent. Mr. Mackay replies, epigrammatically, that "the question is not one of probability but of fact;" and

then says[1] (with great distinctness) that they were not competent; and then thinks the discussion closed. He cites, at any rate, no direct authority for his opinion. I gather that he regards a previously quoted passage from Stair as containing an exhaustive enumeration of the kinds of adjudication which were in use before 1672 (Stair, iii. 2, 45). If the passage was so meant, it certainly does not say so; and, moreover, that passage has been discredited, for if the account which it gives of the origin of adjudications be correct, the decisions which have held any of them to be competent in the Sheriff Courts were wrong.

In the "adjudication in security" Mr. Mackay believes he has found one kind used before 1672, but never used in the Sheriff Court. I admit that this kind never was used in the Sheriff Court, but I dispute that it was used before 1672. Not only is there an entire absence of mention of it before that time, but its origin at a subsequent period can be traced.

Mr. Mackay on this point has said: "Mr. Wilson, by a slip in his letter to you, has said, 'The adjudication in security is the only kind of which it may be safely said that it was introduced after 1672.'" This was no slip: it was said purposely, and I shall presently show you that it is correct; but I must first dispose of Mr. Mackay's authority for saying the contrary.

Mr. Mackay's authority is a passage in Professor Bell's Commentaries, which he has adopted, I fear without examination, as correct. On turning to the passage in Bell (M'Laren's edition, vol. i. p. 752), it will be found that it says plainly enough that adjudications in security were introduced before 1672, but that no authorities for this are quoted. The statement is a mere dictum, and however much Professor Bell's opinion is to be respected, it is too much to ask his unsupported statement in regard to a question of fact occurring in the seventeenth century to be accepted. Perhaps Mr. Mackay may know the authority for the passage, but I have been unable to trace its origin. Possibly it is repeated from the case of *Queensberry's Executors* v. *Tait* (11th July 1817, F. C.), where the reporter quotes a similar statement as having been "observed upon the Bench." If any of the judges really made the statement, the authority on which it was made has not been preserved.

Turning from these, to the contemporary evidence, the matter is put beyond doubt. I have searched through all the ordinary sources of information on such a point, and, so far as I have been able to find, there is no report of, or reference to, any decision upon "an adjudication in security" before 1672; and no mention of such a thing in any writer before that time. And the absence of these things is important, because before 1672 there was no other way in which the purpose of an adjudication in security could be attained—an apprizing in security having been incompetent (*Kinghorn* v. *Strang*, July 19, 1631, M. 96). Stair, who wrote soon after 1672, is also silent about it. At the time of his first edition (1681) the use of

the process had not begun, so far as I have been able to discover; and though it had been used before the second edition was published (1693), Stair had been abroad at the time of its introduction, and either was not aware of the fact or thought its mention unimportant.

There is a passage from Dirleton's Doubts with Steuart's Answers, quoted by Mr. George Ross in his leading cases (Land Rights, vol. i. p. 292), which shows the period when to look for the origin of the adjudication in security. Dirleton, whose work was published in 1698, but written (as the context shows) before 1672, being well aware that an apprizing in security was then incompetent, asks what course should be taken when the debt is *in diem* and the term of payment not come? Steuart, whose work was published in 1715, replies that he thinks the creditor "might be allowed to adjudge in security" (Dirleton's Doubts with Steuart's Answers, p. 69). This fixes the period, and the decisions during it (which are all to be found in the Dictionary, and are mostly quoted in Shand's Practice) show the rest.

In 1684 the adjudication in security was allowed, and as the Bench then differed in opinion as to whether the remedy should be given, this probably was the first time (*Bruce* v. *Hepburn*, Jan. 2, 1684, M. 57, and footnote p. 58). In 1685 it was twice allowed (*Barncleugh*, Feb. 1685, 2 Br. Sup. 72; and *Burnet* v. *Vietch*, Nov. 1685, M. 140). In 1699 a case (*Chalmers* v. *Shaw*, M. 8148) is reported, where the Bench, after hesitation, ended by refusing the remedy as incompetent. Finally, in 1711 the leading case of *Blair* (M. 8149) was decided, settling its competency for all time to come; and there its origin also appears, for in the argument for the successful party (as reported in M. 12908) the remedy is described as having been introduced since 1672, "by custom, on the analogy of the statute." This statement appears only in the argument, but every one knows that in those days the argument for the successful party represented closely the opinion of the Court, and any one may judge for himself whether counsel or reporter was at all likely to misrepresent a matter of fact, then well within the knowledge of many living persons.

I think these authorities show very distinctly the time and manner of the introduction of the adjudication in security, and quite bear out my statement that it came into use after 1672. If Mr. Mackay knows of any authorities to the contrary, let him cite them. All the authorities seem to me in the meantime to corroborate my view, that before 1672 the jurisdiction of the Sheriff Court in adjudications was coextensive with that of the Court of Session.

Mr. Mackay has suggested that my view on this point may have been influenced by my having on other occasions advocated that some heritable jurisdiction ought to be restored to the Sheriff Court. The suggestion has possibility in its favour, but no proba-

bility. The circumstance that the Sheriff Court has practically been stripped of its jurisdiction in adjudications I have never thought a matter of moment. Only a very old-fashioned conveyancer requires to resort, except in the rarest cases, to adjudications for the purpose of making up titles; and as to their use in recovering debts, little inconvenience can be caused by their not being competent in the Sheriff Court, when a creditor has the power of using in that Court a diligence which at one stroke deprives his debtor not only of heritable property, but of every sixpence which he possesses. I have never asked the extension of the Sheriff Court jurisdiction to meet merely imaginary grievances. If I have advocated the giving of a moderate amount of heritable jurisdiction, it has been because, time after time, it has happened to me to see either that the want of it has caused a denial of justice under circumstances of great hardship, or that the costly remedy given elsewhere has been worse than the ailment.—I am, etc.,

J. DOVE WILSON.

SHERIFF'S CHAMBERS, ABERDEEN,
Nov. 12, 1879.

LAW AND LEGISLATION OF THE PAST YEAR.

SHERIFF COURT HOUSE, GEO. IV. BRIDGE,
EDINBURGH, 31*st October* 1879.

SIR,—In the November number of your Journal just delivered to me, you make a grave—I had almost said a disgraceful—charge against me. My meaning is that the charge would be a disgrace to me if it were true. I shall quote your own words: "It is not upon them [the officers of the Crown] that the vials of Mr. Hallard's wrath are poured forth. All his energy is reserved for the Bench; and his attack must be characterized as, to put it in the mildest language, highly improper. *He delivered a philippic* to a body of gentlemen intimately connected with the Supreme Court *against one of the most eminent of Scottish Judges.*"

It is sufficiently hard on me that, as your publication is a monthly one, I must for a month submit to this charge without contradiction.

I plead not guilty with a clear conscience, and request, as matter of fair dealing, that you will in your next publish this letter, and any words or sentences of my address on which your accusation is based.—I am, etc., FREDERICK HALLARD.

[We have cheerfully afforded space for Sheriff Hallard's letter, and no doubt the profession will be glad to learn that, so far at least as intention went, there was on his part no "philippic" against any judge. The learned gentleman asks us to point to any passages in his address capable of such an interpretation, and we fulfil his desire by turning to p. 13, where, after quoting from the direction

of the presiding judge to the jury where they were told that there must have been an intention to deceive on the part of the prisoners, Mr. Hallard proceeds thus: "What the prosecutor undertook to prove was intent to defraud. Intent to deceive—intent to defraud—are these, then, convertible terms? They are indeed interchangeable in the looseness of colloquial talk or in the warm rhetoric of an indignation meeting, but not surely in the cold and accurate language of the criminal law. Had the indictment used the same formula as the judge; had it set forth—not intent to defraud but—intent to deceive, the relevancy would surely have been discussed under very different conditions. In this aspect does the kernel of the matter show by contrast with the indictment." Again, on p. 14, comes the somewhat flippant allusion to Bill Sykes, and shortly afterwards this sentence: "We must know, we are presumed to know, the law we break; we do not know, we cannot be presumed to know, a law which no human authority, legislative or judicial, has hitherto declared." Talking elsewhere of his Lordship's charge, we are told that "those who take their impressions from unthinking public opinion will read certain passages of that important and now historical document with some surprise."

It was not, however, only to these particular passages that our observations last month referred. The general tone of the remarks made by the learned Sheriff certainly conveyed to us an impression for which the classical phrase employed did not appear too strong, and we venture to think that at least a considerable section of the profession took the same view.

We are pleased to have the assurance, although it may have caused us at first some surprise, that Mr. Hallard had no intention of becoming aggressive towards the Supreme Bench; and his disclaimer will be read, we have no doubt, by every one with satisfaction and with a certain sense of relief.—ED. *J. of J.*]

Obituary.

MARK NAPIER, Esq., Advocate, Sheriff of Dumfriesshire.—As we are going to press, the news reaches us of the death of the abovementioned gentleman, which took place at Edinburgh on the 23rd November. We extract the following notice of him from the *Edinburgh Courant*, reserving any more detailed observations till our next:—

"The deceased gentleman was a descendant of the Napiers of Merchiston, and could trace amongst his ancestors a commingling of the noble families of Montrose, Mar, and Hopetoun, as well as the celebrated Border race of Scott of Thirlestane. His great-grandfather, Sir Francis Scott, inherited the barony of Napier on the death of his grandmother, Baroness Napier, in 1706, and

through his marriage with a daughter of the Earl of Hopetoun had five sons, of whom Mark, the grandfather of the subject of our notice, was the youngest. He was a Major-General in the army. The deceased gentleman's father, Francis, was the eldest son of the Major-General, his mother being Mary Elizabeth Jane Douglas, the eldest daughter of Colonel Archibald Hamilton.

"Mark Napier was born on the 24th July 1798, and received his early education at Edinburgh High School. He there proved himself to be an apt scholar, and attained the position of dux of the school. From the High School he entered the Edinburgh University, of which he became a graduate, and selecting the bar for a profession he passed as an advocate in 1820. Connecting himself from an early period with the Conservative side of politics, he, in course of time, held office as advocate-depute when the Conservatives were in power, and, on a vacancy occurring in the sheriffship of Dumfries in 1844, he was appointed to that position, which he had ever since continued to hold.

"A man of fine literary tastes and acquirements, Mr. Napier devoted much of his time to antiquarian and genealogical studies, and the result of these he laid before the world in several valuable biographies. Along with Patrick Shaw he published 'Cases decided in the Court of Teinds, 1821-31;' and in 1834 he issued his first biographical work, 'Memoirs of John Napier of Merchiston,' the inventor of logarithms. A life of Napier had been published towards the end of last century by David Stewart, Earl of Buchan, and Dr. Walter Minto, and sketches of him had otherwise appeared, but this eminent man remained without a special biographer until the publication of Mr. Mark Napier's 'Memoirs.' That this should have been the case is all the more remarkable, seeing, as has been aptly observed, that 'the contradiction it presents of abstruse theological studies, a belief in the art of divination, and other superstitions, and great scientific acquirements, all meeting in the character of the old Scottish laird, a solitary student in fierce tumultuous times, gives a picturesqueness and attraction to the story of his life.' In 1835 he published a 'History of the Partition of the Lennox.' Three years afterwards Mr. Napier produced a work in two volumes, 'Montrose and the Covenanters,' forming the commencement of a series of works in which he gives the results of laborious researches into the historical records, public and private, bearing on the life of the first Marquis of Montrose, whose sister was married to the first Baron Napier of Merchistoun. This was followed by 'The Life and Times of Montrose' in 1840, a work which he afterwards expanded and published in two volumes in 1856, under the title of 'Memorials of the Marquis of Montrose.' He claimed by this to have done much in the way of redeeming the character of Montrose from the calumnies of two centuries by the closest of biographical scrutinies and the most unquestionable of evidence, and at the same time to have laboured so far success-

fully in the cause of justice and truth. In 1848 he edited 'Memorials of Montrose and his Times,' in two volumes, for the Maitland Club. Amongst other publications by him was a letter on the subject of the Sheriff Courts, 1852, and 'Commentaries on the Law of Prescription in Scotland,' 1854.

"The most celebrated of his writings may, however, be said to be 'Memorials and Letters Illustrative of the Times of John Graham of Claverhouse, Viscount Dundee,' issued at intervals, in three volumes, from 1859 to 1862. In his latest edition of the Montrose biography he gave intimation of his intention to produce this work in the following words: 'The latest and most brilliant historian of England, too disdainful of minute inquiry where party feeling predominates, speaks of the "seared conscience and adamantine heart" of the Great Dundee, and tells us that "*James* Graham of Claverhouse'—thus betraying carelessness or ignorance of the very name he is consigning to merited obloquy—rapacious and profane, of violent temper, and obdurate heart, has left a name which, wherever the Scotch race is settled on the face of the globe, is mentioned with a peculiar energy of hatred. No historical character, we verily believe, was ever more recklessly portrayed, or in colours more false than these. In due time, *Deo volente*, Dundee, too, must be redeemed from the vulgar error of history, thus glorified by the golden pen that delights the present age.' These 'Memorials,' it will be in the recollection of most of our readers, gave rise to considerable controversy, the subject being discussed not only in newspaper letters and articles, but also in the leading magazines of the day. This arose from the exhaustive manner in which Sheriff Napier dealt with the statements of Wodrow and Macaulay relative to the martyrdom of Margaret M'Lauchlin and Margaret Wilson in Wigtown Bay. The present is not the occasion to discuss the arguments which were then advanced for and against the carrying out of the sentence passed upon these two women. Suffice it to say that Mr. Napier, while admitting that it was proved that they were tried and condemned, also says that it was proved they were reprieved, and that it was not proved that they were, nevertheless, drowned in pursuance of their sentence.

"The learned Sheriff was latterly engaged on a large quarto volume, which is in the press, and in course of publication by Mr. Douglas, entitled 'The Lanox of Auld;' an epistolary review of 'The Lennox,' by William Fraser, to which is added 'A Memorie of the House of Merchiston.' Included in the work are portraits, facsimiles of letters, and other illustrations. Probably the last production which has been published from his pen is a long and interesting letter which appeared in the *Courant* on the 1st of August last relative to the restoration of St. Giles' Cathedral and the search made for the remains of the Marquis of Montrose, as narrated in Dr. William Chambers' recent history of the building.

"In the course of his practice at the bar Sheriff Napier acted as

counsel in a noted heraldic dispute, mentioned by Mr. Seton in his book on 'Heraldry,' relative to the Cunningham supporters. The case was pleaded before Lord Robertson, Mr. Cosmo Innes being counsel for the heir-male and Mr. Napier for the heir-in-line.

"The deceased gentleman was held in the highest respect and esteem. He carried the honours of his office with a courtly and dignified demeanour, and was much beloved both in public and private life. He had a great fund of humour, which made him an agreeable companion, and was exceedingly popular as a Sheriff.

"Sheriff Napier married his cousin Charlotte, daughter of Mr. Alex. Ogilvy, and is survived by her and by a son, who is in the Royal Navy, and a daughter, who is married to Colonel Rice."

JAMES STARKE, Esq. of Troqueer Holm, Advocate. An aged member of the Faculty has been removed by death in the person of the above-named gentleman, who died on the 8th ult. Although a member of the Scottish Bar the principal work of his life was done far away from his native country, Mr. Starke having been a judge in Ceylon for many years. Of studious habits and cultivated taste, he employed the later years of his life in contributing many papers of local interest to the Dumfriesshire Antiquarian Society on the archæology and antiquities of the district, besides which we believe he wrote several legal articles, which appeared in various journals. The following notice is taken from a local paper:—

"Mr. Starke was born in 1798, and passed at the Scottish Bar in 1824. He entered the Reformed Town Council of Edinburgh when Sir James Forrest, Bart. of Comiston, was the Lord Provost, and was speedily elected one of its magistrates, being chosen the Senior Bailie of the city. He contributed many legal and other articles to the serials then popular, and was the author of a treatise on partnership. He was ordained an elder of Lady Yester's Church in 1831, when the late venerable Principal Lee of Edinburgh University was its minister; and he represented first the burgh of Whithorn, in Galloway, and afterwards the city of Edinburgh in the General Assembly of the Church. In 1839 he received from the Secretary of State (Lord John Russell) the appointment of Queen's Advocate of Ceylon, and a few months after his arrival in that island he was raised to the Bench of the Supreme Court there with the title of the Honourable Mr. Justice. The qualities of his intellect and heart made him highly respected; his decisions always blending mercy with justice. He felt glad that during the whole period he was on the Bench it only fell to him once to pass sentence of death. Mr. Starke retired in 1853, and subsequently purchased the beautiful residence of Troqueer Holm, in which he died. He married Miss Hamilton Gibson, daughter of Major Gibson, and of an old Haddington family, who died in 1859. There are two sons who survive, viz. Jas. Gibson, also a member of the

Scottish Bar and lately a judge in Jamaica; and William, a Lieutenant-Colonel of the 15th Regiment. Mr. Starke was a Liberal in politics."

The Month.

A curious tragedy was recently enacted at Littowk, on the Russian frontier, if we may credit the Austrian journal, the *Fremdenblatt*. It appears from that newspaper's story that two Jews, father and son, had long lived on bad terms, and at last the son hired a peasant for twenty pieces of silver "to facilitate the departure of the old man from this vale of tears." On the day fixed for the execution of the crime the peasant repented, and, going to the intended victim, confessed all that had passed. The father made him promise to pretend to his employer that the crime had been committed, and he then went to the rabbi, Joseph Beer, before whom he laid the matter. After due deliberation the rabbi determined to see the son and to inform him that his murdered father had appeared to him in a dream, and he asked his murderer whether he would appear before a terrestrial or celestial jury. The son, quite overwhelmed, chose the former tribunal, which was accordingly formed, and consisted of ten influential parishioners. The father was placed behind a curtain. The prisoner having been placed at the bar, the judges rose, and the rabbi solemnly invited the spirit of the dead man to bring forward his accusation. Hardly had the son recognised the voice of his father when he was seized with terror and fell down dead. The procurator of the province, on learning what had passed, at once caused the rabbi and the other members of the court to be arrested.

Christmas Recess.—The Court of Session will rise for the Christmas recess on Saturday the 20th December. The sittings for jury trials will, however, begin on Monday the 22nd, but if the experience of the last few years may be trusted, the rolls will not be heavy.

Mr. J. BALFOUR PAUL, Advocate (1870), has been appointed Registrar of Friendly Societies for Scotland, in room of Mr. Archibald Anderson, who has resigned.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF NAIRN.

Sheriff MACLEOD SMITH.

HUGH MANN *v.* EARL OF CAWDOR.—Nov. 14, 1879.

Sale of trees—Question as to quantity.—The pursuer in February 1879 purchased from the defender 1000 dozen props which were said to be lying in the

Ardersier plantation, at the price of 1s. 6½d. per dozen, and on the 21st of that month he paid the price, amounting to £77, 1s. 8d. He proceeded thereafter to drive the props to Campbeltown, where they were shipped, but when the driving was completed, it was found that there was a large deficiency in the number. The pursuer accordingly applied to the defender for repayment of the sum overpaid by him, but this was refused. He accordingly raised this action, which by consent of parties was remitted for trial to the Small Debt Roll. Proof was led at considerable length, and the agents for parties heard on its import, and his Lordship has now pronounced the following judgment :—

"It appears that there was a quantity of cut trees lying for sale in the Ardersier plantation, belonging to the Earl of Cawdor, in January last. The trees were cut in lengths of 6 feet, 9 feet, 12 feet, 15 feet, and 18 feet, and they were intended for props of 6 feet each. The 9-feet and 15-feet trees were to be reckoned respectively at 1½ and 2½ props. Mr. Stables, as factor for Lord Cawdor, ordered the number of props contained in the trees to be counted, and the result of the counting as reported to Mr. Stables was that there were 956 dozen of props. The counting was done by two of Lord Cawdor's foresters, each of whom took a part of the ground extending from thirty to forty acres or upwards over which the trees were lying, and the mode of counting was by making a mental calculation of the lengths up to ten dozen of props, which was noted down, and by repeating the same procedure until the whole were counted. When Mr. Stables was informed that there were 956 dozen of props on the ground, he caused other forty-four dozen of props to be cut so as to make the total number of 1000 dozen. On that footing he sold 1000 dozen of props as lying in the plantation to the pursuer, Mr. Mann, in the beginning of February last, at the rate of 1s. 6½d. per dozen. Mr. Mann accepted the representation made to him without seeing or looking at the props, and without taking any other means to ascertain their number, and at once paid the price, amounting to £77, 1s. 8½d. Mr. Mann caused three Campbeltown carters to be employed to drive the trees from the plantation to Campbeltown, where they were to be received and shipped by Mr. William Nicholson, who acts as Mr. Mann's agent there. The carters soon after commenced the driving of the trees, and did so more or less continuously until the whole of them were brought to Campbeltown, about the end of June or beginning of July. There was no counting of any kind on the part of Mr. Mann until the trees were shipped, and his carters were to be paid according to the quantity when ascertained on shipment. The trees were shipped from time to time in three cargoes, the loading of the last of which was completed on 8th July. It was then found that the total quantity shipped, and, as Mr. Mann maintains, the total quantity received or taken delivery of by him, was only 812½ dozen of props, leaving a deficiency of about 187½ dozen, and he now sues the seller for repayment of the price of that deficiency for which he paid the seller, and for which he says he has received no value. Mr. Mann intimated the deficiency to the seller as soon as it was ascertained.

"The seller, on the other hand, maintains that the trees were counted and sold in good faith, that Mr. Mann took the risk of them on himself, that having broken bulk and intromitted with them he is debarred from making any claim such as the present, and that at all events he is not entitled to do so after their having been so long in his possession and under his control. The parties have been long dealing with each other, and it has not been stated or suggested on either side of the case that there has been any fraud or bad faith of any kind on the part of any person concerned.

"If the commodity had been of small bulk in proportion to its value, and if it were susceptible of being easily abstracted or interfered with or adulterated or exchanged, such as grain or flour or tea or sugar or artificial manures or the like, in regard to which it would be practically impossible for the seller to have any sufficient check or control after coming into the hands of the purchaser and after bulk being broken, it would be exceedingly dangerous after the lapse of

any substantial interval of time to entertain claims on the part of the buyer on alleged grounds of deficiency in quantity or quality. In regard to quantity, such claims can only be sustained if made in the promptest manner and proved by unquestionable evidence. In regard to quality, it may be said that the buyer has practically no legal redress if he receives or consumes any part of the commodity after perceiving the deficiency.

"But other commodities may be in a different position, if by their bulk and nature they can be more easily traced and identified. In regard to them, if the buyer act in a fair and reasonable manner, and if there be no room to apprehend any prejudice or violation of equity against the seller, there is more latitude in the application of the legal principles which bear no such questions as may arise. If, for example, a person had reason to believe that he had 100 cattle in a park, and sold them on that footing at so much per head, and the purchaser bought and paid for them on the same footing, and if the purchaser after taking delivery of them in parcels from time to time were to find out at the end and be able to prove clearly that there were never more than 90 cattle in the park, there can be no doubt that the purchaser would be entitled to repayment for the shortcoming. It would be an important distinction, however, if instead of buying the cattle at so much per head the purchaser had offered a gross sum for the whole, because in that case he would probably be held to have taken his chance of the number.

"Both sets of principles have application to the present case. If Mr. Mann had set about retailing the trees in small quantities and brought numbers of people to the ground so as to expose them to pilfering or the like, or if they had been mixed with the proceeds of any other plantation, or gone through a number of hands so as to render it difficult to trace or identify them, it would be very unreasonable to expect the seller to involve himself with any accounting of that kind. But when, as in the present case, the trees have been carried in bulk to one spot, and laid down there under the observation of at least four people who had an interest in watching them from day to day until they were shipped, the identity is preserved throughout. The quantity shipped is also beyond doubt, because check-tallies were then kept in a manner which precluded any reasonable possibility of mistake. This being the whole which was carried from the plantation, the question arises, what became of the other 187 dozen of props? 187 dozen of props would make nearly a cargo of the same average size as the others. It is not impossible, though there has been no suggestion to that effect, that a few trees may have disappeared by pilfering, but this at the outside would not account even for the odd seven dozen, much less for the 187 dozen. The only other solution in the absence of fraud is that there must have been an enormous blunder in the original counting. This was by no means impossible and not very unlikely, because, owing to the breaking down of a previous transaction with another party in regard to the same trees, the counting made before the sale to the pursuer seems to have been done without the usual checks. Counting of trees in a plantation, whether standing or lying, is an exceedingly difficult matter. Any person who choses to make the trial will soon appreciate the difficulty of preventing some from being counted two or three times over, and others from being missed altogether. I am informed that it usually takes three men working together with marks to count trees with reliable accuracy. Yet, in the present case, there was only one man working in each part of the defender's plantation without even checking each other, and they profess that they carried the numbers made up of threes and sixes in their heads for each batch of counting up to 720 feet. One of the foresters himself said that he might have gone wrong by a few dozens up or down, but of course they maintained generally that their counting was substantially correct. If, however, this had been an action by the seller for the price of the wood instead of an action of repetition, the evidence of the foresters would have been very insufficient as legal proof of the quantity. It seems to be clear, therefore, from the whole other evidence that the counting by the foresters is the only stage at which any substantial error could have taken

place, and in the absence of fraud there seems to be no alternative but to hold that there must have been some miscounting or blundering in the reckoning so made. If so, there could not have been 1000 dozen of props on the ground at the time of the sale to the pursuer, and if there was not he is entitled to get back his money in so far as regards the deficiency of 187½ dozen of props. He will therefore get decree for that amount with expenses."

Act.—Mackenzie.——*Alt.*—Campbell.

SHERIFF COURT OF BANFFSHIRE.

Sheriff Scott Moncrieff.

SCHOOL BOARD OF INVERKEITHNY *v.* SLESSER.

Education Act, 1878—*Employment of children.*—The judgment sufficiently states the facts of this case.

Sheriff Scott Moncrieff said : "This case is the first which has been tried in this Court under the Education Act of 1878, and is one of considerable importance in a district such as this, where there must always be an amount of juvenile employment. The Act of 1878 amends in certain respects the principal Act of Lord Young of 1872. Although it extends the age during which a child shall not be employed, except upon certain conditions, from 13 to 14, and although it increases the penalty which may be imposed upon those who violate its provisions from 20s. to 40s., I think it is very clear to any examining the Act that it is, on the whole, more favourable to the employers of labour. For one thing, I may point out that whereas, under the principal Act, any one who employed a child under the age was liable to imprisonment, the penalty now is a fine merely. In the present case, the accused took into his employment at Whitsunday last a boy who, according to certificate duly produced, will not be 14 years of age until the 6th July 1880. Now, under certain sections of the Education Act there are certain exceptions to the prohibition which it contains against the employment of such children. If there is no school within three miles of the residence of the child, or if such employment is during the holidays or the hours during which the school is not open, or if the School Board issue an exemption, then the employer of such a child is not liable. But it is quite clear that in this case none of these exceptions arise. There were schools within a proper distance of the place where the child resided, and the employment was during school-hours. Further, there was no exemption issued by the School Board. But again, under the 13th section of the Act, it is provided that no employer shall be liable in the penalty imposed where he has used due diligence to observe the enforcement of the Act, or when a child has been engaged by some agent or workman without his knowledge, or upon a forged or false certificate, or by trusting to the representation of the parent of the child that it was beyond the prohibited age. The Act further provides that when a child shall have a certificate from one of her Majesty's Inspectors of Schools of ability to read and write and a knowledge of elementary education, he may be employed, notwithstanding his age. It was contended here that it lay upon the prosecutors to establish that no such certificate existed, and I confess, upon looking to the form in which the libel is drawn out, the question seemed to me one of some nicety and of importance. The question of the onus of proof in all cases is one of difficulty, and depends to some extent on circumstances. There are two well-known rules, however, which may have some application to this case. One is that no one in ordinary circumstances is bound to prove a negative, and the other is that parties are bound to prove what lies specially within their own knowledge. With reference to such a case as this, I may say that although I can imagine it sometimes difficult for a prosecutor to prove that no such certificate existed, it seems to me that if it does exist, then it should always be easy for a person in the position of the accused to prove its existence, or at least that it has existed, because if any one takes into his employment a child who is under age,

he ought clearly to satisfy himself that the child has obtained such a certificate. He ought to demand it from the child or its parents who bring it to him, and if he does not, it seems to me that he incurs a risk, and it may be the onus of satisfying the Court, in the event of a prosecution, that such a certificate did exist. However, I have to deal with the present case as laid before me, and take the whole evidence which has been disclosed, apart from the question of how much the prosecutor was bound to prove; and, doing so, I can have no doubt that such a certificate did not in this case exist. The accused himself has been examined about it, and so was the child, and neither of them knew anything about it; and I therefore must hold it proved that no such certificate was ever granted. Now, the only question to be disposed of is whether the accused can avail himself of the provisions of the 13th section of the Education Act, which has been framed so as to exempt all cases where there would be a manifest hardship upon the employer. It seems that when this child was brought to the accused, his grandmother, who took charge of him, told the accused that she did not think the child was then of the proper age. She thought, however, that when he went into the service of the accused he would have reached that age, but she warned him that she could not speak certainly on the subject, and he himself seems to have been under some apprehension of incurring risk, for he asked her what he was to do if the School Board came down upon him, and she said that in that case he must just hand him over to the Board. Now, I think if I were to hold that a person taking a child into his employment, and doing nothing further than this in the way of inquiry, complied with the Act, I should be treating this Act as if it were practically a dead letter. Therefore I must hold that the accused has rendered himself liable to a conviction under the statute, and that he cannot avail himself of the provisions of the 13th section of the Act. A great deal of proof was led to show that this child had been formerly employed, that the Board had been careless in the execution of their duty regarding him previously, and that they were themselves ignorant of the change in law, and misled the accused. I do not think that such evidence is relevant upon the question whether or not this man took this child into his employment at an age when the child should not have been employed. But I am disposed to give effect to the evidence, as also to the fact that this is the first prosecution in this district under the recently-passed statute, and I am willing to modify the penalty in the present case to the sum of 5s."

Act.—Hossack.——*Alt.*—Morrison.

SHERIFF COURT OF ALLOA.

Sheriffs Johnstone and Monro.

LORD MAR v. COMRIE AND OTHERS.

Right of Way.—The interlocutor explains the circumstances of the case:—

"*Alloa, 6th September* 1879.—The Sheriff-Substitute having heard parties' procurators and considered the cause, Finds in fact (1) that the line of road claimed running through the farm of Jellyholm, the property of the pursuer, the Right Hon. the Earl of Mar and Kellie; (2) that said road consists of two parts, *videlicet*, (first) the part known as the Burns Path or Road between the points A and B of the plan No. 10 of process, and (second) the part known as the road through the Highlandman's Strip between the point B and the Old Mains Coal Pit near point C of the said plan; (3) that the Old Mains Coal Pit was only opened within the last four years; (4) that for the last seven years, and for a considerable period previous thereto, the Burns Path or Road has been in the possession of the public and has been used by them as a public road for foot-passengers: Finds in law (1) that in regard to the Burns Path or Road the defenders are entitled to a possessory judgment; (2) that in regard to the path through Highlandman's Strip to the Old Mains Pit the defenders have

failed to prove such possession on the part of the public during the last seven years as to entitle them to a possessory judgment: Therefore recalls the interim interdict in so far as applicable to the Burns Path or Road between the points A and B of the plan: *Quoad ultra* continues the interdict: Finds neither party entitled to expenses, and decerns. TYNDALL B. JOHNSTONE.

"*Note.*—The line of road claimed seems naturally divisible into two parts. With regard to that part of it known as the Burns Path, it appears to the Sheriff-Substitute that whatever the question of right may be, the evidence of possession during the last seven years is quite sufficient to entitle the defenders to a possessory judgment. No doubt attempts have been made during that time, by the erection of fences and notice-boards, to prevent the public passing along the path, but these attempts have been practically without effect, and the use of the path has been openly asserted as a matter of right. This in the opinion of the Sheriff-Substitute is the clear import of the evidence so far as regards the Burns Path.

"With regard to the other part of road claimed, *videlicet*, that part running through the Highlandman's Strip, the averment of the defenders in the second article of their statement of facts is as follows: 'The remaining part of the road along Highlandman's Strip to the coal pit has likewise been from time immemorial, and at least for the last forty years, a public road or footpath, and used by the public as such.' Now it is in evidence that the coal pit in question, which is there made one of the *termini* of that part of the road, was only opened some four years ago, and has only been working two years or thereby. The averment of the defenders, therefore, that they have been in possession of the road from foot of Highlandman's Strip to the coal pit for the last seven years is evidently incapable of proof, the *terminus ad quem* not having been in existence seven years ago.

"Evidence has been led to the effect that the public have to a certain extent used the road from the foot of Highlandman's Strip to the service-road at point C of the plan. There is, however, no averment on record to that effect, and the Sheriff-Substitute is of opinion that this evidence ought not to have been admitted and must now be disregarded. Independently of this objection, it appears to the Sheriff-Substitute that the evidence of possession of this part of the road is not satisfactory. It appears to him that although the path in question was undoubtedly used previously to the opening of the Old Mains Pit, the use made of it up to that time was of a somewhat vague and desultory character. Several of the witnesses say that they were in the habit of going as far as the mill-race, which intersects the path, and then leaving the path, and straying along the side of the mill-race; and one of the defenders (Thomas Dawson) states on cross-examination that he has not used any path through Highlandman's Strip to the south of the mill-race during the last seven years. Any minute analysis of the evidence appears to the Sheriff-Substitute to be unnecessary. As the success has been partial, no expenses have been allowed.

"T. B. J."

Sheriff Monro on appeal pronounced the following interlocutor:—

"*Edinburgh, 17th October* 1879.—The Sheriff having considered the reclaiming petition and answers, Refuses the petition: Finds the right honourable petitioner liable in the expenses since the date of the interlocutor of the Sheriff-Substitute, and remits to the auditor to tax the same and report to the Sheriff-Substitute. GEO. MONRO.

"*Note.*—The case of *M'Kerron* (15th February 1876), although very different from the present case, throws much light on the principle of the case.

"G. M."

Act.—Buchanan.——*Alt.*—Laing.

SHERIFF COURT OF KILMARNOCK.

Sheriff-Substitute COOPER.

APPEAL—DOUGLAS *v.* THOMSON'S TRUSTEE.

Sequestration—Poinding—Ranking of creditor.

"*Kilmarnock, 10th November* 1879.—The Sheriff-Substitute having heard parties' procurators, and considered the note of appeal, and relative documents, Finds that the appellant is entitled to be ranked preferably on the funds of the estate in respect of a poinding executed by him on the 18th day of December 1878: Therefore sustains the appeal, remits to the trustee to rank the appellant preferably as aforesaid: Finds the appellant entitled to three pounds three shillings expenses, and decerns. W. S. COOPER.

"*Note.*—This is an appeal by William Douglas against the following deliverance of the trustee in William Thomson's sequestration: 'The claimant claims to be ranked preferably on the funds of the estate in respect of a poinding executed by him on the 18th day of Dec. 1878, but as he has failed to give effect to the poinding before sequestration was awarded, it has become of non-effect and is now worthless. The trustee therefore rejects the claim as made, and admits it to an ordinary ranking on the estate. The claimant is entitled to a preferable ranking for the charges of poinding which the trustee is open to receive, and shall leave the matter open for ten days to allow the claimant to lodge the claim as stated.' It appears that the poinding was executed on the 18th Dec. 1878, and reported on the 20th of the same month, that John Wilson (trustee on the estate of William Thomson, under a pretended trust-deed) presented a petition to the Sheriff to interdict William Douglas from selling any of the poinded effects; that the Sheriff-Substitute granted interim interdict on 23rd December 1878; and that the final interlocutor of the Sheriff (refusing interdict and recalling interim interdict) was dated 16th April 1879. The date of the sequestration is 29th March 1879. It is, therefore, clear that the poinding was executed prior to the sixtieth day before sequestration, and it is also clear that it was through no negligence on his part that William Douglas did not carry the poinding into effect. Is the appellant, then, entitled to be ranked preferably in respect of his poinding? The 108th section of the Bankrupt Act (19 and 20 Vict. cap. 79) says that no poinding executed on or after the sixtieth day prior to the sequestration shall be effectual, but provides that a poinder, before the date of sequestration, who shall thus be deprived of the benefit of his diligence, shall have preference for the expense incurred by him in such diligence. And section 12 of same Act states that poindings which shall have been used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, shall be ranked *pari passu* as if they had been all used of the same date. There is thus a clear distinction drawn between poindings executed prior to the sixty days and those executed within the sixty days or four months after. The trustee has ranked William Douglas preferably as regards the charges of poinding, and has thus placed him in the same position as if he had used diligence *within* the sixty days. Surely the appellant is entitled to some benefit from his timely use of diligence. In Murdoch's 'Manual of Bankruptcy' (p. 90, secs. 439, 440) it is said, 'In the case of a fund being under arrestment executed prior to the sixtieth day before the sequestration, the arresting creditor falls to claim his preference in the ranking, but meantime the trustee takes possession of the arrested fund.' The same principle would seem to apply in the case of a poinding executed prior to the sixtieth day before the sequestration, though the point has not been determined.' The Sheriff-Substitute is of opinion that the appellant having executed a poinding prior to the sixtieth day before the sequestration, and not having negligently failed to carry it into effect, is entitled to be ranked preferably in respect of the poinding. W. S. C."

Act.—Smith.——*Alt.*—Stevenson.

Notes of English, American, and Colonial Cases.

RESTITUTION OF CONJUGAL RIGHTS.—*Separation deed.—Pleading.*—An agreement by deed made between husband and wife and trustees containing reciprocal covenants and a renunciation by the husband of his rights, his wife's property by which the husband and wife agreed to live separate and apart is a bar to a suit by the wife for restitution of conjugal rights. Husband and wife agreed by deed to live separate and apart. Several years after the separation the wife instituted a suit for restitution of conjugal rights. The Court, holding that though its practice remained unchanged, it was bound, like the other Divisions of the High Court of Justice, to administer law and equity according to the rules contained in the 24th section of the Judicature Act of 1873, declined to restrain the petitioner by injunction from proceeding with the suit, or to order a stay of proceedings, and required the question of the sufficiency of the deed of separation as a defence to the suit to be raised by plea.—*Marshall* v. *Marshall*, 48 L. J. Rep. P. D. & A. 49.

COPYRIGHT IN A MUSICAL COMPOSITION.—*Registration—International Copyright Act.*—An opera was composed by O. and represented in France, and a pianoforte arrangement by S. was published immediately afterwards. In registering the opera under the International Copyright Act, the name of the opera and its composer and the correct date of its first composition were given, but in addition the date of the publication of the pianoforte arrangement, in which no copyright was claimed, was given, and that arrangement was deposited at the time of registration, but not the score of the opera itself, which had not been printed. *Fairlie* v. *Boosey* (H. L.), 48 L. J. Rep. Chanc. 697. In a suit by B., the assignee of O., to restrain an infringement by X. of his exclusive right of representing the opera,—*Held*, affirming the judgment of the Court of Appeal, that what was intended to be registered was the music of the opera, not the arrangement for the piano. *Held*, also, that the printing and publishing of an arrangement containing the harmony and tune of a musical composition may amount to such a printing of the composition as to oblige the composer to notice it in registering the composition under 7 & 8 Vict. c. 12, and to deposit a copy of it at Stationers' Hall. But that it was unnecessary to decide whether the printing of the arrangement by S. was or was not such a printing of the opera by O.; for that the entry relating to the arrangement, if erroneous and bad, would not vitiate the good entry relating to the opera.—*Ibid.*

PRINCIPAL AND AGENT.—*Notice of agency—Order and disposition—Reputed ownership—Bankruptcy Act.*—B. & Co., manufacturers, consigned their goods to S. & Co. for sale on commission as *del credere* agents. S. & Co. also sold goods for other manufacturers on similar terms. S. & Co. described themselves in their invoices and on the brass plate on the business premises as "merchants and manufacturers' agents." On the bankruptcy of S. & Co.,—*Held*, that the creditors of S. & Co. had sufficient notice that the bankrupts were trading as agents as well as principals; and that goods of B. & Co. in the possession of S. & Co. at the commencement of the bankruptcy were not within the mischief of the reputed ownership clause.—*Re Smith; ex parte Bright* (App.), 48 L. J. Rep. Bankr. 81.

COMPANY.—*Policy—Life insurance—Member—Contributory—Memorandum of association.*—Where the articles of an unlimited insurance company provided for two classes of members, shareholders and participating policyholders, and gave both classes a voice in the management, a participating policyholder was placed on a list of contributories separate from the list of shareholder contributories. *Semble*,—Regulations of a company relating to proper subject of the articles, though placed in the memorandum of association, may be altered.—*In re The Albion Life Assurance Society. Winstone's Case*, 48 L. J. Rep. Chanc. 607.

PRINCIPAL AND AGENT.—*Authority to pledge credit—Insanity of principal—Effect of an authority of agent.*—The defendant having held out his wife to the plaintiff as having authority to pledge his credit afterwards became insane. The plaintiff, being unaware of the insanity, continued to supply the wife with goods on credit:—*Held*, that the defendant was liable to the plaintiff for the price of the goods so supplied. *Drew* v. *Nunn* (App.), 48 L. J. Rep. Q. B. 591. Insanity so great as to deprive the insane person of any contracting mind revokes an authority given by him, when sane, to an agent; and an agent who, after knowledge of such insanity on the part of the principal, continues to act on the authority so given, will himself be liable to the person with whom he so deals.—*Ibid.*

MINES.—*Coal mine—Neglect of general rules under* 35 & 36 *Vict. c.* 76, *s.* 51—*Liability of agent as well as manager.*—The Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 61, enacts certain general rules which are to be observed in every mine to which that Act applies, and that every person who contravenes or does not comply with such rules shall be guilty of an offence against the Act, and that in the event of any contravention of or non-compliance with any of the rules "by any person whomsoever being proved, the owner, agent, and manager shall each be guilty of an offence against the Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules," to prevent such contravention or non-compliance. The manager of a coal mine in Staffordshire and the respondent, the agent of the same mine, were summoned for non-compliance with the first general rule for procuring adequate ventilation in the mine. The magistrate convicted the manager, under whose directions the mine was being worked, but declined to convict the agent also of the same offence:—*Held*, that the agent as well as the manager of a mine to which the said Act applies was liable to be convicted of an offence against the Act, in not complying with the said rules as to ventilation in the mine, unless he gives evidence to show that he had to the best of his power enforced the said rules.—*Wynne* v. *Forrester*, 48 L. J. Rep. M. C. 140.

RAILWAY COMPANY.—*Negligence — Passenger — Implied contract to carry although an express contract by another railway company.*—The S. W. R. Company have a station at R. and a railway from R. to S., where defendants' line of railway joins, and defendants have running powers over the railway of the S. W. R. Company from S. to R. Plaintiff took a return ticket of the S. W. R. Company from R. to a station beyond S. belonging to defendants, and on the return journey from such station to R. he went by one of defendants' trains under the management of defendants' servants. On arriving at R. he received an injury in attempting to alight there by reason of the platform being considerably lower than the carriages of the train, such carriages being suitable only for the platforms of the stations throughout defendants' own line and not for the platform at R. In an action against defendants for such injury, the jury having found that it was caused by defendants' negligence,—*Held*, that notwithstanding there was a contract with the S. W. R. Company by their issuing the ticket to plaintiff, there was evidence of an undertaking on the part of defendants to carry plaintiff to R. with reasonable care and with reasonable facility also for alighting on the platform at R. at the end of the journey, and that they were liable for their neglect to perform such undertaking.—*Foulkes* v. *The Metropolitan District Rail. Co.*, 48 L. J. Rep. C. P. 555.

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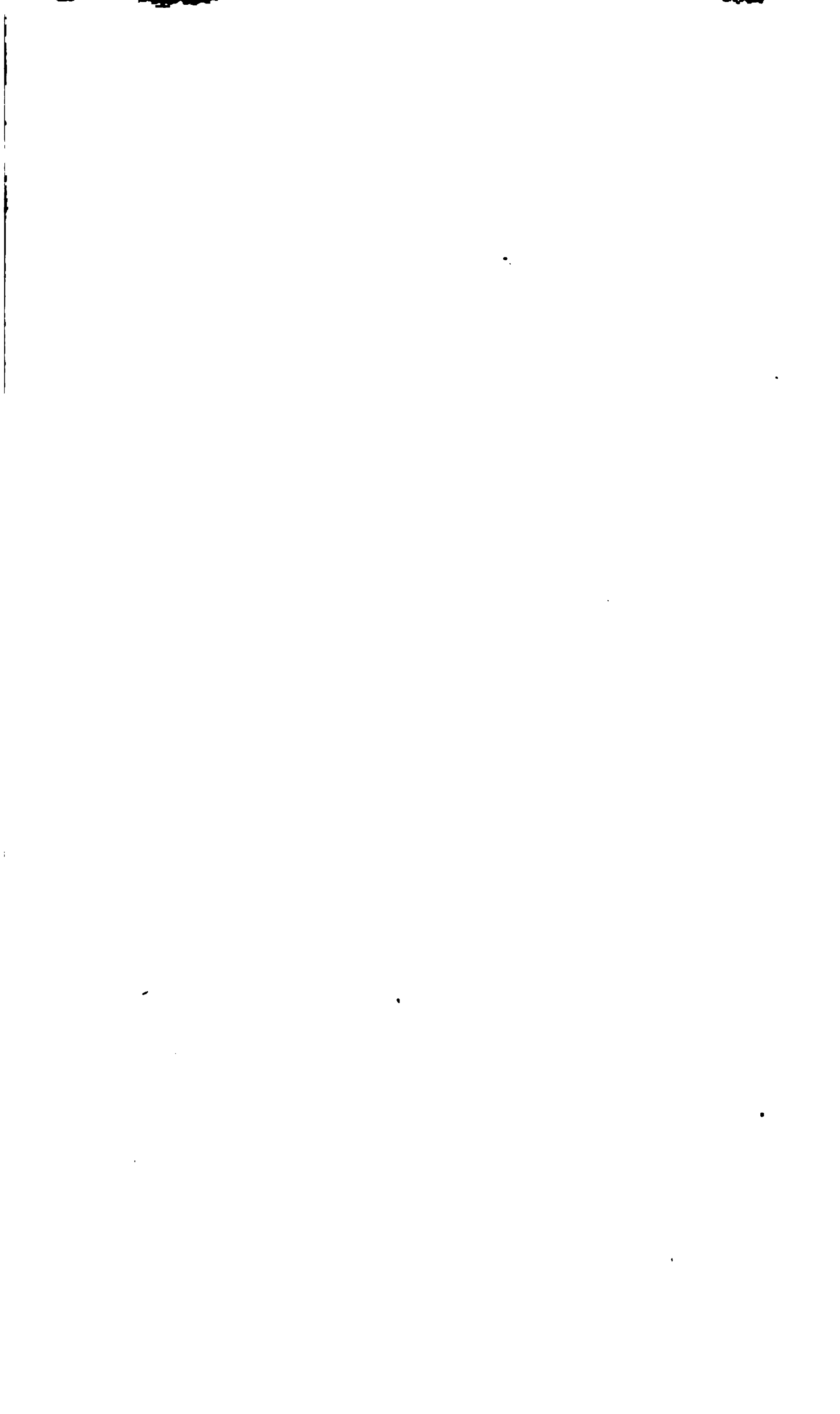

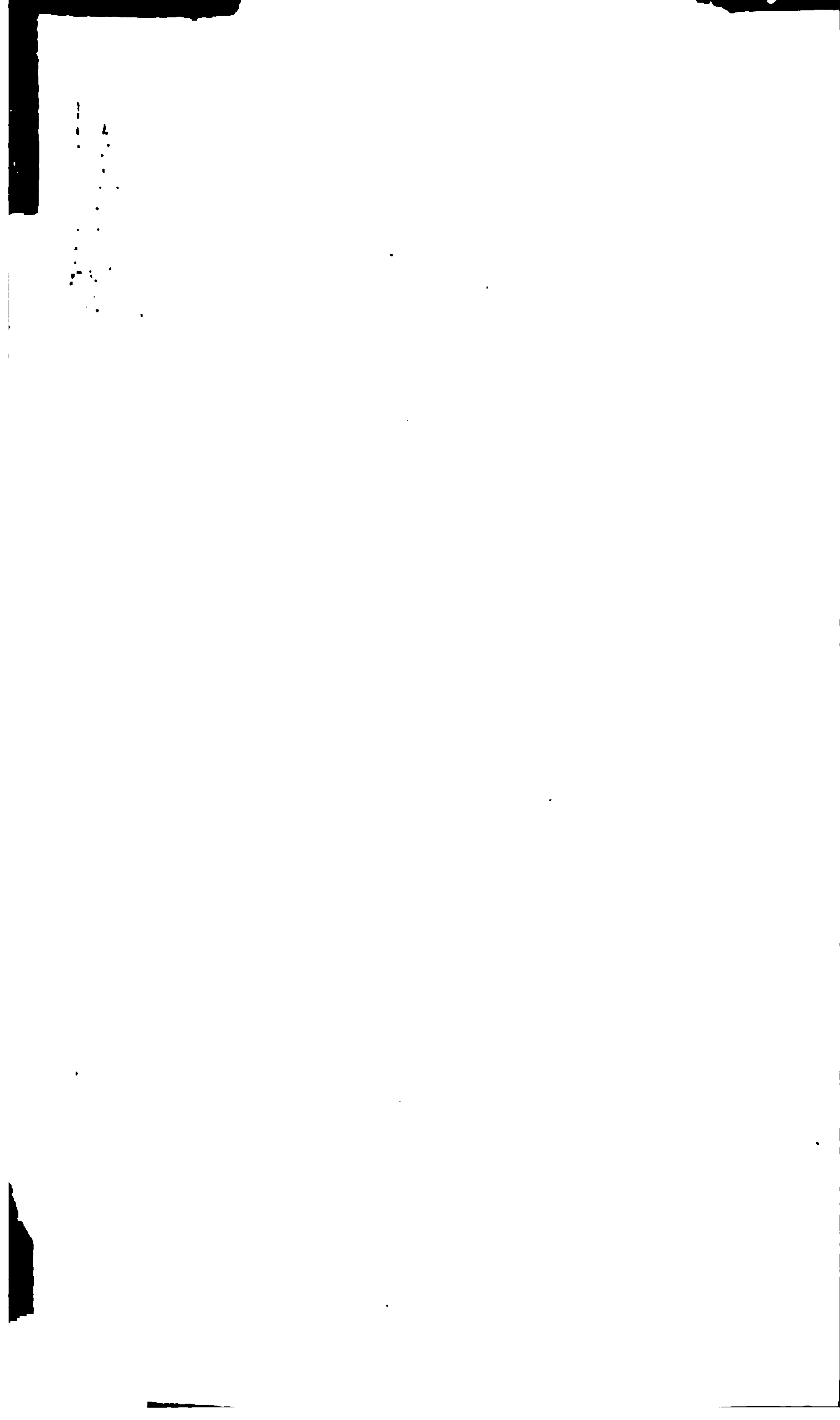

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